Supreme Court, U.S.
FILED

(1) 053 JUN 24 2005

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

HERBERT L. BENDOLPH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal courts of appeals are divided on the first question set forth below:

(1) May a district court *sua sponte* raise the statute of limitations in a *habeas corpus* proceeding notwithstanding the respondent's failure to raise that affirmative defense in its answer?

(2) Where there is undisputed evidence that someone other than the petitioner altered a court document in a way that would have misled the petitioner with respect to when he was required to file his *habeas* petition, was it error for the court of appeals to affirm the dismissal of his petition as untimely without remanding the case for an evidentiary hearing to consider if the limitations period should be equitably tolled?

LIST OF PARTIES

Petitioner Herbert L. Bendolph is a federal inmate. Respondent is the United States of America. As a result of the Third Circuit's consolidation of two cases for *en banc* argument and decision, Julio Otero was a party to the *en banc* proceeding. Mr. Otero, a federal inmate, is not seeking this Court's review.

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Petitioner Herbert L. Bendolph respectfully requests that a writ of *certiorari* issue to resolve a direct split among the federal courts of appeals on the principal issue in this petition, an issue that divided the *en banc* Third Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Appendix A) is reported at *United States* v. *Bendolph,* 409 F.3d 155 (CA3 2005) (*en banc).* The opinion of the district court (Appendix B) is unreported but available at *United States* v. *Bendolph,* 2001 U.S. Dist. LEXIS 9032, 98-601-SLR (D. Del. Jan. 2, 2001).

JURISDICTION

The *en banc* court of appeals entered its judgment on May 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2255.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 2255 and § 2244(d)(1) are excerpted in relevant part in Appendix C.

STATEMENT OF THE CASE

Factual Background

Petitioner Herbert L. Bendolph is a federal inmate, having been convicted by a jury in the District of Delaware of being a felon in possession of

a firearm.[1] Mr. Bendolph took an appeal to the Third Circuit, which affirmed by judgment order dated May 5, 1997.[2] The court of appeals entered a certified copy of its judgment in lieu of a formal mandate on May 27, 1997. That document noted that the judgment was entered on May 5, 1997, and that the certified copy of the judgment in lieu of a formal mandate was entered on May 27, 1997.

In his trial and his direct criminal appeals, Mr. Bendolph was represented by a federal public defender. On August 25, 1997, she filed on his behalf a petition for a writ of *certiorari*.[3] A copy of the court of appeals' certified judgment entry in lieu of a formal mandate filed with the *certiorari* petition appears to have the "5" in "May 5 1997" typed over such that the date of the judgment of the court of appeals appears to be "May 27 1997."[4]

This Court denied the petition on October 20, 1997. On October 18, 1998, less than a year after this Court denied his *certiorari* petition, Mr. Bendolph (by then acting *pro se)* filed a motion under Section 2255, 28 U.S.C. § 2255.[5]

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1 *United States* v. *Bendolph,* No. 01-2468 (CA3 2005), App. A at 6a.

2 *Id.*

3 *Id.*

4 *Id.* at 7a.

5 *Id.*

Proceedings Below

The district court conducted a preliminary review of Mr. Bendolph's Section-2255 motion as it was required to do under Rule 4 of the Rules Governing Section 2255 Proceedings in the United States District Courts.[6] After conducting that review, the district court directed the government to file an answer to the Section-2255 motion.[7]

The government filed its answer on December 17, 1998. It did not assert as an affirmative defense the statute of limitations in the Antiterrorism and Effective Death Penalty Act (the "AEDPA").[8]

More than 20 months later, the district court *sua sponte* entered an order raising the possibility that Mr. Bendolph's Section-2255 motion was untimely.[9] The district court reasoned that Mr. Bendolph had one year to file his Section-2255 motion from this Court's denial of a *timely* petition for a writ of *certiorari*.[10] The district court allowed both Mr. Bendolph and the government to address the possible application of the statute of limitations, both did and

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6 *Id.* at 7a.

7 *Id.*

8 *Id.* at 7a-8a.

9 *Id.* at 8a.

10 *Id.* at 8a-9a. The district court relied on the Third Circuit's opinion in *Kapral* v. *United States*, 166 F.3d 565, 575, 577 (CA3 1999).

the district court then dismissed Mr. Bendolph's motion as time-barred.[11]

Mr. Bendolph took an appeal. The Third Circuit entered a certificate of appealability, and it appointed the undersigned as *pro bono* counsel.[12]

In reviewing the files provided them by the Third Circuit and by the federal public defender, *pro bono* counsel discovered the altered date described above. On appeal from the denial of the Section-2255 motion, in addition to arguing that the district judge should not *sua sponte* have raised the timeliness issue, Mr. Bendolph argued that the date alteration provided a basis for equitable tolling of the AEDPA's statute of limitations. Mr. Bendolph argued that he and this Court were misled by the altered date such

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11 *Id.* at 8a.

12 The certificate of appealability included the following language:

> Petitioner's application for a certificate of appealability is granted as to the issues of: (1) whether the District Court may *sua sponte* raise the issue of whether Petitioner's § 2255 motion is barred by the statute of limitations and direct the parties to address the issue, where the government did not plead the statute of limitations as an affirmative defense; and (2) To the extent the District Court had authority to *sua sponte* raise the statute of limitations issue, whether Petitioner's § 2255 motion should be deemed timely in light of the Supreme Court having "filed" his petition for certiorari.

(citations omitted).

that he did not know he could not rely on the October 20, 1997, denial of *certiorari* as the trigger date for the one-year limitation for filing.[13]

A three-judge panel of the Third Circuit heard consolidated oral arguments in *Bendolph* and three other cases raising similar issues. Before the panel issued an opinion, the full Third Circuit reheard *Bendolph* with *United States* v. *Otero,* a case raising a similar issue.

The *en banc* court delivered its decision on May 16, 2005. Seven judges formed a majority that affirmed the dismissal of Mr. Bendolph's claim, while five judges dissented. One judge wrote an additional, shorter dissent in which four others joined.

The majority agreed with the decision of a three-judge panel of the Third Circuit in *Long* v. *Wilson*[14] (a Section 2254 case) that a district judge may *sua sponte* raise the AEDPA's statute of limitations.[15] While the *en banc* majority in this case held that the government may waive the AEDPA's statute of

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[13] Mr. Bendolph relied on the Third Circuit's authority in *Seitzinger* v. *Reading Hospital & Medical Center,* 165 F.3d 236, 240-41 (CA3 1999), which held that equitable tolling of statutes of limitations might be appropriate in "extraordinary circumstances." The Third Circuit has applied that reasoning in *habeas* cases. *See, e.g., Brown* v. *Shannon,* 322 F.3d 768, 771 (CA3 2003).

[14] 393 F.3d 390 (CA3 2004). There is a petition for a writ of *certiorari* pending in *Long* (No. 04-10035).

[15] App. A at 21a.

limitations, it held that, despite the government's waiver, the district court may nonetheless raise that affirmative defense on its own motion so long as the petitioner has notice and there is no prejudice to the petitioner from the government's failure to have raised the defense earlier.[16]

The majority conceded that comity and federalism, which played a substantial role in the analysis in *Long*, play no role in review of federal convictions and sentences under Section 2255.[17] Yet, despite the different policy concerns underlying Sections 2254 and 2255, the court decided that Sections 2254 and 2255 are indistinguishable for purposes of the *sua-sponte* invocation of the statute of limitations, and the majority made its holding applicable to *habeas* requests by both federal and state inmates.[18]

The majority concluded that Mr. Bendolph had notice and that he suffered no prejudice, and so it affirmed.[19] It mentioned the issue of the altered

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16 *Id.* at 28a. In *Long*, the Third Circuit held that, unless the petitioner could establish prejudice, a district judge could *sua sponte* dismiss the case as time-barred. 393 F.3d at 401. Notably, in *Long*, the Third Circuit drew the prejudice standard from the jurisprudence related to Fed. R. Civ. P. 15, despite the fact that the respondent in that case never sought leave to amend his answer.

17 App. A at 19a.

18 *Id.*

19 *Id.* at 33a-34a.

document but did not consider whether that fact warranted a remand to consider equitable tolling.[20]

The five judges in dissent began by asserting that the court should have remanded the case for a factual determination on the altered document/ equitable tolling issue.[21]

The dissenting judges then explained that the majority's holding ran counter to "the rule that generally it is not appropriate for a court to *sua sponte* raise non-jurisdictional defenses not raised by the parties" and that "[i]n an adversarial system, it is not for the courts to bring to light the best arguments for either side; that responsibility is left to the parties themselves."[22] In a similar sense, the dissent argued that it is typically unfair for the courts to act as "surrogate counsel for one side but not for the other."[23]

The dissenters pointed to this Court's decision in *Pliler* v. *Ford,* in which the Court in a somewhat different context made clear that calculating the AEDPA's statute of limitations is not for the district

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20 *Id.* at 6a-7a.

21 App. A at 37a. It is important to note that, while Mr. Bendolph was and this Court might have been misled by the document alteration, the government could not have been. It received its own copies of the relevant documents from the Third Circuit and, so, was on notice of the actual, relevant dates.

22 *Id.* at 41a-42a.

23 *Id.* at 43a.

courts but for counsel or the parties.[24] The author of the dissent wrote that the majority's determination

> also sends a disturbing message: We will aid the government in a habeas proceeding, but not the petitioner. The mistakes of the government may be excused and ignored, but any error by the petitioner is fatal – perhaps figuratively, but too often literally. The favored-party status the majority affords to the government in habeas cases undermines both the appearance and the fact of judicial neutrality, and I will have no part in it.[25]

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are now split on the principal issue presented in this case: whether a district court may *sua sponte* assert the AEDPA's statute of limitations when the *habeas* respondent has answered and not raised a timeliness defense. Two courts of appeals, including the Third Circuit in this case, now hold that the district judge may do so. Two courts of appeals hold that the district judge may not. This Court should step in to bring uniformity to the issue.

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24 124 S.Ct. 2441, 2446 (2004).

25 App. A at 51a-52a.

A. THE CIRCUITS ARE SPLIT ON THE QUESTION OF WHETHER A DISTRICT JUDGE HAS THE ABILITY *SUA SPONTE* TO RAISE THE AEDPA'S STATUTE OF LIMITATIONS AFTER THE RESPONDENT HAS FAILED TO DO SO.

Most of the federal courts of appeals have agreed that the AEDPA's statute of limitations is non-jurisdictional and therefore waivable,[26] but they disagree sharply about the effect of such a waiver.

In this case, a sharply divided *en banc* Third Circuit disagreed with the Sixth and Ninth Circuits and held that, in a *habeas* case governed by Section 2255 or Section 2254, a district court may raise and dispose of the motion or petition on the basis of the statute of limitations in the AEDPA notwithstanding the fact that the respondent did not raise that affirmative defense in its answer or at any time thereafter. The Third Circuit's determination was in error.

1. The Eleventh Circuit has adopted the same rule as has the Third Circuit.

Last year, the Eleventh Circuit reached a determination largely in accord with the Third

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[26] *See, e.g., Robinson* v. *Johnson*, 313 F.3d 128 (CA3 2002); *Acosta* v. *Artuz*, 221 F.3d 117, 122 (CA2 2000); *Hill* v. *Braxton*, 277 F.3d 701, 705 (CA4 2002); *Kiser* v. *Johnson*, 163 F.3d 326, 328 (CA5 1999); *Scott* v. *Collins*, 286 F.3d 923, 927 (CA6 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134 (CA9 2004).

Circuit's decision in this case. In a *per curiam* opinion in *Day* v. *Crosby,*[27] a three-judge panel determined that Rule 4 of the Rules Governing *Habeas Corpus* Cases Under Section 2254 ("Rule 4") allows a district court *sua sponte* to dismiss a petition after the respondent filed his answer and did not raise the statute of limitations.[28] Mr. Day has filed a petition for a writ of *certiorari* (No. 04-1324), and it remains pending.[29]

2. The Sixth and Ninth Circuits have decided the issue in a way directly at odds with the holding of the Third Circuit in this case and the Eleventh Circuit in *Day*.

The holding of the Third Circuit in this case and of the Eleventh Circuit in *Day* are in direct conflict with the holdings of two other federal courts of appeals.

In *Scott* v. *Collins,*[30] the Sixth Circuit considered a case in which the state answered a Section-2254 petition but did not raise as an affirmative defense the AEDPA's statute of limitations. A federal magistrate

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27 391 F.3d 1192 (CA11 2004).

28 In an unpublished opinion, the First Circuit has likewise agreed that a district judge may raise the Section-2255 statute of limitations *sua sponte* after the United States has waived it. *Celikoski* v. *United States,* 21 Fed. Appx. 19 (CA1 2001).

29 The Court's docket suggests that the *Day* petition will be considered in the conference at the end of September 2005.

30 286 F.3d 923 (CA6 2002).

judge *sua sponte* raised the statute of limitations, gave the inmate an opportunity to argue against its application and then recommended denying the petition as untimely. The district judge agreed.

A divided panel of the Sixth Circuit reversed. The majority held that Rule 4 might allow a district court properly to raise the AEDPA's statute of limitations before it orders the respondent to respond to the petition. It relied on Rule 4's requirement that the district court conduct a preliminary review of the petition, dismiss it if it "plainly appears" that the petitioner is not entitled to relief, but otherwise require the respondent to file an answer or other response. The majority held, however, that the district court's ability *sua sponte* to raise the statute of limitations "expires" once the respondent files an answer or other response and waives the statute-of-limitations defense. The majority reversed the dismissal and explained that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter (after giving the petitioner notice and an adequate opportunity to be heard) does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense."[31]

The Ninth Circuit considered an almost identical situation last year, and it reached the same result. In *Nardi* v. *Stewart*,[32] an inmate filed a Section-

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31 286 F.3d at 930.

32 354 F.3d 1134 (CA9 2004).

2254 petition, the district court required the respondent to answer and the answer did not assert a timeliness defense. The district judge nonetheless raised the issue *sua sponte* and dismissed the petition. The Ninth Circuit reversed, holding that "[t]he district court lacked the authority to revive Respondent's affirmative defense."[33] The court expressly followed the Sixth Circuit's opinion in *Scott*.[34]

In its decision in this case, the Third Circuit expressly acknowledged the holdings of the Sixth and Ninth Circuits in *Collins* and *Nardi*, and it confirmed what it held just six months before in *Long*: that it disagrees with and will not follow those cases: "We rejected two decisions *contra*, *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) and *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004)."[35]

A direct conflict between the courts of appeals is a compelling reason to grant *certiorari*. Simply stated, had this case arisen in either the Sixth or the Ninth Circuit, Mr. Bendolph would have prevailed on appeal.

In addition, the conflict is persistent and intolerable. The issue has recurred (in the past four years, the First, Third, Eleventh, Ninth and Sixth Circuits have considered it), and it is likely to recur

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33 354 F.3d at 1142.

34 *Id.*

35 App. A. at 16a.

again both in those circuits in which there is now binding authority and in those yet to consider the issue.[36] None of the courts of appeals that have considered the issue have retreated from their positions, and there is no reason to conclude they will.

This Court should grant the petition, establish a uniform rule of law and give guidance to those courts that have yet to confront the issue.

B. THIS CASE PRESENTS AN IMPORTANT ISSUE REGARDING JUDICIAL POWER, AND THIS CASE IS A PARTICULARLY APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE ISSUE.

This Court long ago explained that "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." [37]

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[36] *See, e.g., Holden* v. *Mechling,* No. 03-2364, 2005 U.S. App. LEXIS 9487 (CA3 May 24, 2005); *Knecht* v. *Shannon,* No. 01-2330, 2005 U.S. App. LEXIS 9568 (CA3 May 25, 2005); *Gildon* v. *Bowen,* 384 F.3d 883 (CA7 2004); *Armstrong* v. *United States,* 107 Fed. Appx. 522 (CA6 2004); *Hill* v. *Braxton,* 277 F.3d 701 (CA4 2002); *Acosta* v. *Artuz,* 221 F.3d 117 (CA2 2000); *Kiser* v. *Johnson,* 163 F.3d 326 (CA5 1999); *McNary* v. *Dretke,* No. 3:05-CV-0519, 2005 U.S. Dist. LEXIS 10792 (N.D. Tex. June 2, 2005); *Brodeur* v. *Patrick,* No. 03-6092, 2005 U.S. Dist. LEXIS 8731 (E.D. Pa. May 11, 2005); and *Hill* v. *Addison,* No. CIV-04-1728, 2005 U.S. Dist. LEXIS 9513 (W.D. Okla. April 27, 2005).

[37] *Ex parte Yerger,* 75 U.S. 85, 95; 8 Wall. 85, 95 (1869).

Congress' adoption of the AEDPA placed significant and unprecedented strictures on the availability of *habeas* relief. For the first time, there is now a statute of limitations. For the first time (outside of this Court's jurisprudence regarding abuse of the writ), there is a prohibition on successive petitions.

Because of the AEDPA's strict limitation on successive petitions, the application of the AEDPA's statute of limitations can and often does amount to a determination of whether an inmate will ever have a federal court hear the merits of a *habeas* petition. There is a crucial need, then, for the courts to balance Congress' intent in enacting the AEDPA with the centuries'-old importance of maintaining the availability of the writ of *habeas corpus*.

The Court has recognized that importance in a number of cases accepted for review in the past term and for the upcoming term, all of which dealt with application of the statute of limitations in *habeas* cases. *See, e.g., Pace* v. *DiGuglielmo*,[38] *Rhines* v. *Weber*,[39] *Mayle* v. *Felix*[40] and *Lamarque* v. *Chavis*.[41]

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[38] 125 S. Ct. 1807 (2005) (untimely state post-conviction petition is not "properly filed" under Section 2244(d)(2)).

[39] 125 S. Ct. 1528 (2005) (district court has discretion to stay a mixed *habeas* petition while inmate exhausts state remedies).

[40] No. 04-0563 (June 23, 2005) (amended *habeas* petition does not relate back so as to avoid the AEDPA's statute of limitations when it introduces new claims).

In the context of *habeas corpus,* the Court has held that "uniformity among federal courts is important on questions of this order . . . ."[42]

This case presents an issue of just as much importance. The Third Circuit has broadly decreed that there is almost no limit to a district court's ability to weigh in on the side of the respondent in a *habeas* proceeding to inject affirmative defenses the respondent itself should have raised (indeed, in a companion case to Mr. Bendolph's, *United States* v. *Otero,* which the Third Circuit resolved in the same opinion, the court held that the district court could raise the statute of limitations *sua sponte* even after the government answered, there was an evidentiary hearing and there was an appeal).[43]

This case presents a particularly strong vehicle for the Court to resolve the circuit split. The judgment of the Third Circuit ended Mr. Bendolph's hopes of obtaining *habeas* review, and there are no remaining proceedings. The statute of limitations was the only impediment to a merits review of Mr. Bendolph's *habeas* motion (because Mr. Bendolph presented a Section-2255 motion, there could be no

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41 No. 04-0721 (whether inmate "unreasonably delayed" filing state-court petition such that he was not entitled to tolling).

42 *Thompson* v. *Keohane,* 516 U.S. 99, 106 (1995) (granting *certiorari* to resolve conflict in *habeas* law among the courts of appeals).

43 App. A at 34a.

lingering issues of failure to exhaust or of procedural default). In addition, the opinions of the *en banc* Third Circuit provide thorough explications of the competing views on the principal issue in this petition.

C. AS THE DISSENT RECOGNIZED, THE THIRD CIRCUIT IS NOW "ON THE WRONG SIDE" OF THE SPLIT AMONG THE CIRCUITS.

The Third Circuit erred in holding that a district court could *sua sponte* raise the AEDPA's statute of limitations long after the government filed its answer and failed to assert that affirmative defense.

First, it is generally inappropriate for courts to raise non-jurisdictional affirmative defenses not raised by the parties themselves.[44] The reason is simple: ours is an adversarial system in which the parties themselves assert their claims and defenses and judges decide among competing arguments.[45]

Those courts that have held that district courts may raise the AEDPA's statute of limitations *sua*

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[44] *See Acosta* v. *Artuz*, 221 F.3d 117, 122 (CA2 2000).

[45] *See McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (describing difference between adversarial and inquisitorial systems of justice); *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

sponte have relied on comity, federalism and finality as their reasons.[46] However, Mr. Bendolph is a federal inmate who presented a Section-2255 motion. Comity and federalism have no role in a federal court's review of a federal trial and sentence. Even in Section-2254 cases, comity and federalism have no role in consideration of the statute of limitations. Those doctrines require respect for state courts, not a helping hand for state prosecutors.[47] In addition, the interest in finality is best met by having the parties' advocates promptly assert potential affirmative defenses rather than by waiting for months or years (as in this case) for the district judge to do so.[48]

Moreover, this Court has cautioned against judges abandoning their impartial roles to assist parties in calculating the *habeas* statute of limitations. In *Pliler* v. *Ford,*[49] the Court considered the Ninth Circuit's requirement that district courts give two "advisements" when presented with mixed *habeas*

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46 *See, e.g., Long,* 393 F.3d at 403.

47 *Duckworth* v. *Serrano,* 454 U.S. 1, 3 (1981) (comity and federalism allow state courts "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights.").

48 The application of waiver in the Federal Rules of Civil Procedure should apply with no less vigor to *habeas* matters since the Federal Rules of Civil Procedure apply to *habeas* cases unless they are inconsistent with the specific *habeas* rules. *See* Fed. R. Civ. P. 81; *Mayle* v. *Felix,* No. 04-563 at Typescript 7 and n.4 (June 23, 2005).

49 124 S. Ct. 2441 (2004).

petitions. The first was that "it would not have the power to consider [a prisoner's] motions to stay the [mixed] petitions unless he opted to amend them and dismiss the then-unexhausted claims."[50] The second was that that the inmate's "federal claims would be time-barred if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all his claims."[51]

This Court vacated on both points:

> Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. *Requiring district courts to advise a pro se litigant in such a manner would undermine district judges' role as impartial decisionmakers*
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>
> The second advisement would force upon district judges the potentially burdensome, time-consuming, and fact-intensive task of making case-specific investigation and calculation of whether the AEDPA limitations period has

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50 *Id.* at 2445-46 (*citing Ford* v. *Hubbard*, 330 F.3d 1086, 1092-93 (CA9 2003)).

51 124 S.Ct. at 2446 (*citing* 330 F.3d at 1093).

> already run or will run by the time the petitioner returns to federal court.[52]

As the dissent in this case explained, it would be unfair and inconsistent to hold that the district court cannot assist a *pro se* inmate with calculating the statute of limitations but that the same judge could step in to assist the United States government with respect to the same issue:

> A habeas petitioner gets no help from the courts, and the government needs none either. If, as Justice Thomas explained in *Pliler,* calculating the statute of limitations is a job ordinarily reserved for trained counsel, then that job should be left in the able hands of the government's attorneys.[53]

The Third Circuit chose to side with the Eleventh Circuit and to disagree with the Sixth and the Ninth Circuits. In doing so, it not only perpetuated a circuit split, it erred.

This Court should grant this petition and resolve the split among the circuits. Moreover, should the Court determine to review *Day* v. *Crosby* or *Long* v. *Wilson,* it should also review this case because it presents the issue in the contexts of both Section 2254 (the statute at issue in *Day* and *Long*) and Section 2255 (which was not at issue in *Day* or *Long).*

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52 124 S. Ct. at 2446 (emphasis added).

53 App. A at 51a.

D. THE THIRD CIRCUIT'S REFUSAL TO ALLOW AN EVIDENTIARY HEARING ON EQUITABLE TOLLING HAS DEPRIVED MR. BENDOLPH OF HIS ONLY OPPORTUNITY FOR *HABEAS* REVIEW.

Every court of appeals to consider the question has held that, as a non-jurisdictional affirmative defense, the AEDPA's statute of limitations is subject to equitable tolling.[54] This Court has never squarely addressed the issue,[55] although several Justices have implicitly recognized the availability of equitable tolling.[56]

In this case, the majority and principal dissent agreed that there was an altered date in the certified copy of the Third Circuit's judgment attached to the *certiorari* petition filed with this Court during Mr.

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[54] *See, e.g., Miller* v. *New Jersey State Dep't of Corrections,* 145 F.3d 616, 617 (CA3 1998); *Calderon* v. *United States Dist. Court (Beeler),* 128 F.3d 1283, 1289 (CA9 1997), *overruled in part on other grounds, Calderon* v. *United States Dist. Court (Kelly),* 163 F.3d 530, 540 (CA9 1998) *(en banc); Dunlap* v. *United States,* 250 F.3d 1001, 1003 (CA6 2001); *Gibson* v. *Klinger,* 232 F.3d 799, 808 (CA10 2000); and *Harris* v. *Hutchinson,* 209 F.3d 325, 330 (CA4 2000).

[55] *Pace* v. *DiGuglielmo,* 125 S. Ct. 1807, 1811 n.8 (2005).

[56] *See Pliler* v. *Ford,* 124 S.Ct. 2441, 2448 (O'Connor, J., joined by Stevens, J., concurring) ("Nevertheless, if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate.") and (Stevens, J., joined by Souter, J., concurring in the judgment) (". . . I am persuaded that the judgment entered by the Court – remanding to the Ninth Circuit to determine the propriety of equitable tolling – is both consistent with those views and correct.").

Bendolph's direct appeal from his criminal conviction.[57]

The likely effect of the altered document is plain. As Mr. Bendolph informed the district court, the federal public defender told him that she had filed a timely *certiorari* petition, and the copy of the Third Circuit's judgment filed with this Court wrongly suggested that was so. Mr. Bendolph diligently filed his Section-2255 motion less than a year after this Court denied *certiorari*. This was not just lawyer error, it was an affirmative misrepresentation.

Although it recognized the altered-document issue in its factual recitation, the majority of the Third Circuit ignored the issue in its analysis.

The dissenting judges asserted that the undisputed fact that the document was altered warranted a remand for an evidentiary hearing to determine who altered the document and what effect the alteration had on the timeliness of Mr. Bendolph's Section-2255 motion: "I believe it patently unfair of the majority to acknowledge the altered date and then simply affirm the District Court without permitting Bendolph the opportunity to show that he was misled into believing he had time to file his habeas petition."[58]

The courts of appeals that have addressed the issue have held that equitable tolling should be

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57 App. A at 6a-7a (majority) and App. 37-39 (dissent).

58 *Id.* at 39a.

applied when some extraordinary circumstance has prevented a petitioner from making a timely *habeas* filing and when the petitioner has shown diligence.[59]

In this case, the full Third Circuit recognized that something extraordinary occurred: someone other than Mr. Bendolph modified the date on a copy of a Third-Circuit order and submitted that altered document to this Court. That alteration likely caused Mr. Bendolph to miscalculate the date on which his Section-2255 motion – which he filed *pro se* – was due for filing in the district court. That likelihood is significant enough that the Third Circuit should have remanded the case for an evidentiary hearing to develop a factual record.[60] As it is, Mr. Bendolph has now been denied what will likely be his only opportunity for federal *habeas* review.

If it grants this petition with respect to the first issue, the Court should grant review of this issue to confirm that equitable tolling is available with respect to the AEDPA's statute of limitations and to direct the Third Circuit to remand for an evidentiary hearing in this case.

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[59] *See, e.g., Marsh* v. *Soares*, 223 F.3d 1217, 1220 (CA10 2000); *Calderon*, 128 F.3d at 1288-89; *Smith* v. *McGinnis*, 208 F.3d 13, 17 (CA2 2000) (*per curiam*); and *Jones* v. *Morton*, 195 F.3d 153, 159 (CA3 1999).

[60] *See Gonzales* v. *Crosby*, No. 04-6432 at Typescript 6 (June 23, 2005) (Stevens, J., dissenting) (clerical error that prejudiced petitioner was basis for remand); *see also, Valverde* v. *Stinson*, 224 F.3d 129 (CA2 2000) (remanding for hearing on equitable tolling).

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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June 24, 2005

(2)

Supreme Court, U.S.
FILED
05 3 JUN 24 2005
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

HERBERT L. BENDOLPH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 01-2468 & 02-2624

UNITED STATES OF AMERICA

v.

HERBERT L. BENDOLPH,
Appellant at No. 01-2468

UNITED STATES OF AMERICA

v.

JULIO OTERO,
Appellant at No. 02-2624

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 95-cr-00068)
District Judge: Honorable Sue L. Robinson
On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 96-cr-00005-3)
District Judge: Honorable Sylvia H. Rambo
Argued October 26, 2004

Reargued En Banc February 23, 2005
(Filed: May 16, 2005)

Before: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, AND VAN ANTWERPEN, Circuit Judges.

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OPINION OF THE COURT

VAN ANTWERPEN, Circuit Judge.[1]

This *en banc* court is presented with two cases consolidated on appeal. In the first case, Herbert Bendolph appeals from an order of the District Court which dismissed his motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 ("§ 2255 motion") as untimely. In the second case, Julio Otero appeals from an order of the District Court denying him appointed counsel for an ineffectiveness of counsel evidentiary hearing held pursuant to his § 2255 motion. The District Courts had jurisdiction over these matters pursuant to 28 §§ U.S.C. 1331 and 2255. Our jurisdiction arises under 28 U.S.C. §§ 1291 and 2255.

Both cases raise issues concerning whether, under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), courts may raise the timeliness of § 2255 motions *sua sponte*, and, if so, under what circumstances. Neither case falls within the summary dismissal period of Rule 4 of the Rules

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[1] Judge Van Antwerpen wrote the opinion of the Court in which Chief Judge Scirica and Judges Roth, Rendell, Barry, Smith and Fisher joined. Judge Nygaard filed an opinion concurring in part and dissenting in part, in which Judges Sloviter, McKee, Ambro, and Fuentes joined. Judge Sloviter filed an opinion dissenting, in which Judges Nygaard, McKee, Ambro, and Fuentes joined.

Governing Section 2255 Cases for the United States District Courts ("Rule 4 period") because in both cases the government has filed answers that did not raise the AEDPA statute of limitations as a defense.

We asked the parties and *amici*[2] to brief four main issues. *First*, may the government waive the AEDPA statute of limitations as a defense? *Second*, may a district court raise it *sua sponte*? *Third*, if so, at what stages in a habeas case may a district court raise the limitations issue? *Fourth*, may a district court still raise the issue even if the government concedes waiver?

For the reasons discussed herein, we answer the first, second, and fourth issues in the affirmative. As to the third, we answer by concluding that (i) during the Rule 4 period, after giving notice and an opportunity to respond,[3] courts may raise the AEDPA statute of limitations issue *sua sponte* without analysis of prejudice; and (ii) after the Rule 4 period has ended, courts may continue to raise the AEDPA

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[2] We acknowledge the consistently excellent advocacy provided by *pro bono* counsel on behalf of Messrs. Bendolph and Otero throughout the duration of these appeals, as well as the excellent briefs provided by both *amici* in advance of re-argument *en banc*.

[3] Although the court may act upon what plainly appears from the motion, attached exhibits and record, not all limitations issues may appear in such manner. As such, notice and an opportunity to respond should be afforded during the Rule 4 stage. *See* footnote 15 *infra*.

statute of limitations issue *sua sponte*, but only after providing, consistent with our prior decisions in *Robinson v. Johnson*, 313 F.3d 128 (3d Cir. 2002), and *Long v. Wilson*, 393 F.3d 390 (3d Cir. 2004), notice, an opportunity to respond, and an analysis of prejudice. Accordingly, we will affirm the District Court's order in *Bendolph*. In *Otero*, we will reverse and remand to the District Court, with instructions to the District Court that it has discretion to raise the AEDPA limitations issue *sua sponte*.

I.

The relevant facts of these cases may be summarized as follows. A jury in the United States District Court for the District of Delaware convicted Herbert Bendolph of being a felon in possession of a firearm. We affirmed his conviction, 116 F.3d 470, entering judgment on May 5, 1997. The Delaware Federal Defender, acting as Bendolph's counsel, then filed a petition with the Supreme Court of the United States for a writ of *certiorari* on August 25, 1997. Under Supreme Court Rule 13.1, which requires the filing of such petitions within 90 days of judgment, Bendolph's petition was untimely. The Clerk of the Supreme Court was unaware of this, however, because someone involved in the filing of the petition impermissibly altered the date of this Court's judgment. On the copy filed with the Supreme Court, someone had typed the number "27" over the "5" in the judgment date of May 5, 1997. As a result, the

Clerk of the Supreme Court mistakenly believed the petition for *certiorari* was timely.[4]

A year later, on October 18, 1998, Bendolph filed a *pro se* motion under 28 U.S.C. § 2255. This too was untimely: Bendolph was obligated under the AEDPA's one-year statute of limitations to have filed his motion by August 4, 1997, one year from the date on which the 90 day period to file a petition for *certiorari* had ended. *See* U.S. Supr. Ct. R. 13; *Kapral v. United States*, 166 F.3d 565, 575, 577 (3d Cir. 1999) (holding that a judgment may become "final" in the context of §§ 2254 and 2255 when "the date on which the defendant's time for filing a timely petition for *certiorari* review expires").[5] Two weeks after Bendolph filed his § 2255 motion, the District Court ordered the government to file an answer. It did so on December 17, 1998, and did not raise the AEDPA limitations defense.[6] Eight months later, the District

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[4] The Supreme Court subsequently denied the petition for writ of *certiorari* on October 20, 1997.

[5] Bendolph did not get the benefit of tolling for the time the petition was under consideration by the Supreme Court because the petition was untimely and therefore not properly filed. *See, e.g., Merritt v. Blaine*, 326 F.3d 157, 164 (3d Cir. 2003) ("'an application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings,'" including "'the time limits upon its delivery'") (quoting *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 361, 148 L.Ed.2d 213 (2000)) (emphasis in *Artuz*).

[6] At the time this answer was filed, we had not yet rendered our decision in *Kapral*.

Judge retired, and the matter was reassigned to another District Judge.

One year later, on August 24, 2000,[7] the District Court entered an order suggesting the case was untimely under our ecision in *Kapral*, 166 F.3d at 575-77, given that Bendolph had not timely filed a petition for *certiorari* by August 4, 1997, or 90 days after our May 5, 1997 judgment. In its August 24, 2000 order, the District Court identified the reasons why the case appeared to be time-barred, invited the parties to brief the issue, and set a deadline of September 21, 2000 for Bendolph to respond to the District Court's analysis. Bendolph filed a three-page memorandum almost two weeks before that deadline, on September 8, 2000. The government responded on October 5, 2000, agreeing with the District Court that the case was time barred.

The District Court subsequently dismissed Bendolph's § 2255 motion as untimely on January 3, 2001. Now, on appeal, Bendolph argues the District Court lacked the authority to raise the AEDPA limitations period *sua sponte* because the government

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[7] Although the District Court docket sheet and the parties cite August 24, 2000 as the date of the District Court's order, our review of the record shows August 22, 2000 as the date of that order. The discrepancy does not affect the issues now before us.

had waived the defense by not raising it in its answer.[8]

In the second case, Julio Otero pled guilty to operating a continuing criminal enterprise in violation of 21 U.S.C. § 848(a). On May 27, 1998, the United States District Court for the Middle District of Pennsylvania sentenced him to life imprisonment. In accordance with his plea agreement, Otero did not appeal his conviction. On June 25, 2001, Otero filed a *pro se* § 2255 motion challenging the validity of his sentence on several grounds, including ineffective assistance of counsel. The government filed its answer on September 17, 2001. It did not raise the AEDPA's statute of limitations as a defense.[9]

The District Court initially denied all of Otero's claims except his ineffective assistance of counsel claim, for which an evidentiary hearing was scheduled. The District Court did not appoint counsel to represent Otero at that hearing, and denied his claim on the merits. Otero argues on appeal that (i) the District Court erred in failing to appoint counsel for him at his evidentiary hearing, and (ii) neither the District Court nor the government may raise the

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[8] The government initially conceded waiver in *Bendolph*, but now contends under *Long*, which we had not yet rendered at the time these cases were first argued, that waiver has not yet occurred.

[9] The statute of limitations issue was first raised on August 19, 2003 when a panel of this Court entered an order granting Otero a certificate of appealability.

AEDPA statute of limitations issue on remand because the government has waived the defense.[10]

II.

We turn first to the District Court's decision not to provide counsel to Otero at his ineffective assistance of counsel evidentiary hearing. Rule 8(c) of the Rules Governing Section 2255 Cases requires that "[i]f an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel . . . [as an indigent]." The appointment of counsel is clearly mandatory for an indigent petitioner. *See United States v. Iasiello*, 166 F.3d 212, 213-14 (3d Cir. 1999) (vacating judgment and remanding to district court where district court conducted a § 2255 evidentiary hearing without appointing counsel to indigent movant). "[H]arm to [a movant] must be presumed when his statutory right to counsel is thus abridged." *Id.* at 214. The government does not dispute that, as a federal inmate since 1996, Otero is likely indigent; nor does it attempt to rebut the presumption of prejudice. Accordingly, we must reverse the District Court's dismissal of Otero's ineffective assistance of counsel claim. The record is unclear as to whether Otero is indigent and the District Court should inquire as to his status. Should he qualify as indigent, he must be

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[10] As in *Bendolph*, the government in *Otero* initially conceded waiver but has now reversed its position in light of our decision in *Long*.

afforded counsel for his ineffective assistance of counsel claim.

III.

A.

We now turn to the four main issues, *supra*, before us in these consolidated appeals. The analysis of the AEDPA statute of limitations issue, which in these two cases involves undisputed facts, is subject to plenary review. *See, e.g., Long*, 393 F.3d at 396 (citing *Swartz v. Meyers*, 204 F.3d 417, 419 (3d Cir. 2000)); *see also Werts v. Vaughn*, 228 F.3d 178 (3d Cir. 2000).

As we observed in *Long*, our analysis necessarily begins with *Robinson*, 313 F.3d 128. Our prior discussion of that case in *Long* is thorough, *see* 393 F.3d at 396-98, and needs no further elaboration here. In *Long* we encapsulated *Robinson*'s holdings as follows:

> [F]irst . . . because the statute of limitations is not jurisdictional in nature, *see Miller v. New Jersey State Dep't of Corr.*, 145 F.3d [616], 617-18 [(3d Cir. 1998)], the state may waive the defense . . . . [W]e then considered whether Federal Rule of Civil Procedure 8(c) requires that a defendant plead . . . a statute of limitations[] in its answer. . . . We explained: "Parties are generally

> required to assert affirmative defenses early in litigation, so . . . prejudice may be avoided[] and judicial resources may be conserved. Habeas proceedings are no exception.". . . We further emphasized: "The purpose . . . is to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed.". . . . [We then] held that "a limitations defense does not necessarily have to be raised in the answer[,]" [but] must be raised "as early as practicable" thereafter. . . . What the earliest practicable or possible or feasible moment might be in another case . . . we necessarily left open.

Long, 393 F.3d at 397-98 (quoting *Robinson*, 313 F.3d at 134- 37). Consistent with these holdings, we then analyzed in *Long* a Magistrate Judge's report and recommendation that flagged the limitations issue *sua sponte*. We used the analytical framework provided by Federal Rule of Civil Procedure 15(a) because the government had subsequently filed, in response, an "endors[ment] [of] the Magistrate Judge's view that the habeas petition was untimely." *Long*, 393 F.3d at 395. Under Rule 15(a), we articulated a standard for judging prejudice in the AEDPA statute of limitations context as follows:

> [Our prior cases including *Robinson*] counsel that, whether a habeas petitioner has been prejudiced by the assertion of the AEDPA statute of limitations defense after an answer has been filed is the ultimate issue, and that prejudice turns on such factors as how late in the proceedings the defense was raised, whether the petitioner had an opportunity to respond, and whether the respondent acted in bad faith . . . . Delay is related to prejudice but was not a problem here, and inadvertence does not equal bad faith.

Id. at 401 (internal citations omitted). We held that Long was not prejudiced by the government's delay in raising the limitations defense, which it had done through its express endorsement of the Magistrate Judge's analysis of the timeliness issue. We then concluded that the District Court did not abuse its discretion by construing the government's filing as an amendment to its answer. *Id.* at 401.

Addressing the Magistrate Judge's *sua sponte* flagging of the limitations issue, we said:

> Our answer to [this issue] was foreshadowed by *Banks v. Horn*, 271 F.3d 527, 533 n.4 (3d Cir. 2001), *rev'd on other grounds*, 536 U.S. 266, 122 S.Ct. 2147, 1153 L.Ed.2d 301 (2002) . . . . In a

footnote . . . we expressed the view that a court of appeals could address the AEDPA statute of limitations defense *sua sponte* even if the habeas respondent had waived the issue on appeal. We wrote:

> "Even if not raised, we believe we could consider the issue *sua sponte* . . . . The Court has the power to notice a 'plain error' though it is not assigned or specified . . . . In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." . . .
>
> . . .

Thus we observed prior to *Robinson* that the AEDPA statute of limitation is an

> important issue, the raising of which may not necessarily be left completely to the state.

Long, 393 F.3d at 401-02 (quoting *Banks*, 271 F.3d at 533 n.4) (internal citations and quotations omitted). After then reviewing the relevant decisions of the other courts of appeals, especially *Acosta v. Artuz*, 221 F.3d 117 (2d Cir. 2000), we held further that

> our decision in *Robinson* . . . does not prevent a magistrate judge from raising the AEDPA statute of limitations defense *sua sponte* even after an answer has been filed.

Long, 393 F.3d at 403 (internal citations omitted). Fundamental to our analysis was (i) our agreement with the Second Circuit that "[w]hile civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved," *Long*, 393 F.3d at 402 (citing *Acosta*, 221 F.2d at 123), and (ii) our conclusion that courts "may raise the . . . limitations issue . . . after an answer has been filed." *Long*, 393 F.3d at 403. Our basis for the latter was *Granberry v. Greer*, 481 U.S. 129, 134-35, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (holding courts have discretion, in interests of comity and federalism, to require that a claim be fully exhausted or to reject it if it plainly lacks merit), as well as our prior decisions in cases such as *Sweger v. Chesney*, 294 F.3d 506, 520-21 (3d Cir. 2002) (holding courts may consider *sua sponte*

whether procedural default bars claim), *cert. denied*, 538 U.S. 1002, 123 S.Ct. 1902, 155 L.Ed.2d 830 (2003) and *Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001) (holding court of appeals can *sua sponte* consider procedural default). *See Long*, 393 F.3d at 402-403.

We rejected two decisions *contra*, *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) and *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004), concluding they were "at odds with *Robinson* and our Rule 15(a) jurisprudence, which do not require that affirmative defenses be pled in the first responsive pleading." *Long*, 393 F.3d at 403. We then stated that:

> [h]aving in mind that AEDPA's statute of limitations, like other procedural habeas issues, furthers the principles of comity, finality, and federalism, . . . we hold further that a federal magistrate judge may, consistent with *Robinson v. Johnson* . . . raise *sua sponte* the AEDPA statute of limitations defense even after an answer has been filed.

Long, 393 F.3d at 404 (internal citations omitted).

With the analytical framework of *Robinson* and *Long* in mind, we turn to the questions before us.

B.

We must first address whether our decisions in the *Long* and *Robinson* § 2254 cases apply to the § 2255

cases before us today. In resolving the question, we are mindful of our obligation to be faithful to the intent of Congress' 1996 habeas corpus reforms. Congress was cognizant not just of the practical realities of habeas filings, but also the spectrum of federal interests that those realities implicate, as evidenced by "the profound *societal* costs that attend the exercise of habeas jurisdiction." *Calderon v. Thompson*, 523 U.S. 538, 554, 118 S.Ct. 1489, 1500, 140 L.Ed.2d 728 (1998) (internal quotation omitted) (emphasis added). "'AEDPA's purpose'" is not only to further the interests of comity and federalism, but also to further the "'finality'" of convictions, *Duncan v. Walker*, 533 U.S. 167, 178, 121 S.Ct. 2120, 2127, 146 L.Ed.2d 435 (2001) (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490, 146 L.Ed.2d 435 (2000)), and to curb abusive habeas filings. *See, e.g.*, H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (stating that AEDPA was passed, in relevant part, "to curb the abuse of the statutory writ of habeas corpus").[11] Other courts have

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[11] *See also* 141 Cong. Rec. S7803-01 (daily ed. June 7, 1995) (statement of Sen. Nickles) ("[H]abeas procedures are wasteful. The current system is wasteful of limited resources. At a time when both State and Federal courts face staggering criminal caseloads, we can ill afford to make large commitments of judicial and prosecutorial resources to procedures of dubious value in furthering the ends of justice."); *Williams*, 529 U.S. at 436, 120 S.Ct. at 1490 (observing that, in passing the AEDPA, it was Congress' "intent to avoid unneeded evidentiary hearings in federal habeas corpus").

similarly held that "a signal purpose[] animating AEDPA is the desire of Congress to achieve finality in criminal statutes, both federal and state." *Brackett v. United States*, 270 F.3d 60, 69 (1st Cir. 2001) (citations omitted), *cert. denied*, 535 U.S. 1003, 122 S.Ct. 1575, 152 L.Ed.2d 495 (2002). *See also United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) (noting the "intent of Congress that claims under § 2255 be advanced within one year after a judgment of conviction becomes final") (internal citations omitted).

We have similarly recognized the wide spectrum of interests that Congress intended to protect through habeas reform. *See, e.g., Long*, 393 F.3d at 402-03 (identifying interests of judicial economy and finality of judgments in concluding that "[t]he AEDPA statute of limitations is an important issue, the raising of which may not necessarily be left completely to the state"); *Robinson*, 313 F.3d at 137 (recognizing an interest in not "wasting precious legal and judicial resources"). *See also United States v. Brooks*, 230 F.3d 643, 649 (3d Cir. 2000) (observing Congress' intent in amending § 2255 was "to place limits on federal collateral review"); *Banks*, 271 F.3d at 533 n.4 (recognizing interests of, *inter alia*, the public reputation of judicial proceedings and the public interest generally); *Kapral*, 166 F.3d at 571 (recognizing "Congress['] inten[t] to reduce . . . delayed and repetitive [habeas] filings") (internal quotation omitted); *Miller*, 145 F.3d at 618 (stating

that the AEDPA "was enacted, in relevant part, to curb the *abuse* of the writ of habeas corpus.") (emphasis in original).

It is thus clear, we believe, that Congress' intent with respect to habeas reform – one facet of which is the AEDPA statute of limitations – was not limited to interests of federalism and comity, which apply only to petitions filed under § 2254. Rather, Congress was concerned with abuses of, and the interests implicated by, habeas filings under both §§ 2254 and § 2255.[12]

Second, to provide guidance to the district courts, as well as to avoid confusion, we have previously held that we should treat § 2255 motions and § 2254 petitions the same absent sound reason to do otherwise. *See, e.g., Miller*, 145 F.3d at 619 n.1 ("[T]o provide guidance to the district courts, and hence facilitate the orderly administration of justice in these cases, we have followed the practice, whenever we decide an AEDPA issue that arises under § 2254 and the same holding would analytically be required in a case arising under § 2255, or vice versa, of so informing the district courts."). We see no reason to depart from this practice here.

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[12] This conclusion is further reinforced, of course, by the purpose underlying Rule 4 of the Rules Governing Section 2254 and 2255 Cases, which promotes interests of judicial economy and efficiency.

Third, such an approach is consistent with the interests served by statutes of limitations generally. Limitations periods "protect defendants *and* the courts . . . ," *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979) (internal quotation omitted) (emphasis added), because they "free[] . . . courts from adjudicating stale claims," *Sun Oil Co. v. Wortman*, 486 U.S. 717, 736, 108 S.Ct. 2117, 2129, 100 L.Ed.2d 743 (1988) (Brennan, J., concurring). They also support "'the minimization of unnecessary litigation.'" *Felder v. Casey*, 487 U.S. 131, 154, 108 S.Ct. 2302, 2315, 101 L.Ed.2d 123 (1988) (White, J., concurring) (internal quotation omitted). These public and judicial interests transcend the parties to a litigation in the same way as the interests furthered by the AEDPA's limitations period. *See Long*, 393 F.3d at 402-04; *Robinson*, 313 F.3d at 134-37; *Banks*, 271 F.3d at 533 n.4; *Artuz*, 221 F.3d at 123.[13]

Because there exist sound reasons to approach the AEDPA limitations period the same under both §§ 2254 and 2255, and because to do so is faithful with both Congress' intent and our habeas jurisprudence,

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[13] Moreover, limitations periods should be construed consonant with the legislative scheme they support. *See, e.g., American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 557-58, 94 S.Ct. 756, 768, 38 L.Ed.2d 713 (1974). As discussed throughout this opinion, Congress plainly intended strict reform of habeas corpus in passing the AEDPA, and the practical problems of attempting to re-litigate matters which are many years old are obvious.

we hold that our § 2254 decisions in *Robinson* and *Long* apply to AEDPA limitations issues arising under § 2255.

C.

We return to the four main issues we asked the parties and *amici* to brief.

(1) With regard to the government's ability to waive the AEDPA statute of limitations, all of the parties and both *amici* agree that, under our decisions in *Miller*, *Robinson*, and *Long*, discussed *supra*, the limitations period is not jurisdictional and therefore is subject to equitable considerations such as waiver. We accordingly reaffirm our holdings on these issues in these cases.

The more difficult question, which we address *infra*, remains: whether a party's waiver of a defense, intentional or not, may impact the exercise of an inherent power that a court may possess in the circumstances presented here. We foreshadow our answer by observing that neither the parties nor *amici* have cited to us authority requiring that a party's waiver of a defense must necessarily curtail the inherent powers of a court.

(2) As to the second main issue, whether courts *ever* have the power to act *sua sponte* in the circumstances here, the answer is plainly yes. First, as we have discussed *supra*, the cases confirm, in similar contexts, an analogous power. *See, e.g.*, *Granberry*, 481

U.S. at 134-35, 107 S.Ct. 1671; *Sweger*, 294 F.3d at 520-21; *Szuchon*, 273 F.3d at 321 n.13. This authority is persuasive with respect to the issue before us because we have already recognized that the AEDPA statute of limitations is "like other procedural habeas issues." *Long*, 393 F.3d at 404. The application of such cases to the circumstances before us also conforms with *sua sponte* jurisprudence generally.[14]

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[14] In addition to the powers *Granberry* observed, courts may dismiss *sua sponte* for other reasons as well. *See, e.g., Acosta*, 221 F.3d at 121 (collecting cases); *Kiser v. Johnson*, 163 F.3d 326, 329 (5th Cir. 1999) (collecting cases). Nor is the power limited to the habeas context. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502, 67 S.Ct. 839, 840, 91 L.Ed.2d 1055 (1947) (inherent power to dismiss pursuant to the doctrine of *forum non conveniens*); *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S.Ct. 498, 499, 24 L.Ed.2d 586 (1970) (inherent power to dismiss if the defendant is a fugitive).

Analogously instructive is the Supreme Court's decision in *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). *Link* rejected the argument that the power afforded to civil defendants under Fed. R. Civ. P. 41 to move for involuntary dismissals necessarily extinguishes, by negative implication, the courts' powers to dismiss *sua sponte*. *Link*, 370 U.S. at 629-30, 82 S.Ct. 1388 (observing courts have inherent power to dismiss *sua sponte* "to clear their calendar of cases . . . dormant because of inaction or dilatoriness . . . ."). *Link* counsels that concerns arising from *sua sponte* dismissals are best addressed not by curtailing inherent powers, but rather by determining whether a court has acted "within the permissible range of the court's discretion." *Id.* at 633, 82 S.Ct. 1389. We did as much in *Long*, an approach we reaffirm today.

Second, while two circuits disagree with our conclusion in *Long* as to *when* a court may act *sua sponte*, all of the courts of appeals that have considered the issue agree that courts do possess a *sua sponte* power to raise the limitations issue. *See, e.g., Hill v. Braxton*, 277 F.3d 701, 705-06 (4th Cir. 2002) ("Even though the limitations period is an affirmative defense, a federal habeas court has the power to raise affirmative defenses *sua sponte* . . . . We agree with our sister circuits that have determined a district court has the power to raise the limitations defense [to a § 2254 petition] *sua sponte*."); *Jackson v. Sec'y for the Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam) ("we hold that the district court possessed the discretion to raise *sua sponte* the timeliness issue"); *Artuz*, 221 F.3d at 124 (holding "a district court has the authority to raise the AEDPA statute of limitations on its own motion"); *Kiser v. Johnson*, 163 F.3d 326, 329 (5th Cir. 1999) ("In holding that Fed. R. Civ. P. 8(c) does not bar *sua sponte* consideration of the AEDPA's statute of limitations provision, we follow a long line of precedent establishing the authority of courts to raise non-jurisdictional defenses *sua sponte* in habeas cases."). *See also United States v. Sosa*, 364 F.3d 507, 510 (4th Cir. 2004) (applying *Hill* to motion filed under § 2255).

The decisions *contra* to our decision in *Long* with respect to *when* a district court may *sua sponte* raise the limitations issue to not suggest that courts lack the inherent power in the first place. *See Herbst v.*

Cook, 260 F.3d 1039, 1042 (9th Cir. 2001) ("The district court . . . had the authority to raise the [AEDPA] statute of limitations *sua sponte*."); *Nardi v. Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004) (reaffirming *Herbst*'s holding that a district court may raise *sua sponte* the limitations defense, but narrowing the time period in which the court can do so); *Scott v. Collins*, 286 F.3d 923, 930 (6th Cir. 2002) (holding Rule 4 does not give a district court "continuing" power to dismiss *sua sponte* after the Rule 4 period ends).[15]

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[15] Thus it cannot be doubted that, at the very least, courts possess a *sua sponte* power during those stages of a habeas case governed by Rule 4 of the Rules Governing Section 2254 and Section 2255 Cases.
That rule states in pertinent part:

> If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.

See § 2255 Rule 4(b); *see also* § 2254 Rule 4. As this language anticipates, the issues relevant to timeliness may not all appear on the face of a motion or petition, and for this reason courts should give notice that a limitations problem may exist, as well as provide an opportunity for a habeas movant or petitioner to respond. *See, e.g., Hill v. Braxton*, 277 F.3d 701, 707 (4th Cir. 2002); *Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000). We make no distinction as between habeas movants filing *pro se* and those represented by counsel. *See, e.g., McMillan v. Jarvis*, 332 F.3d 244, 245 (4th Cir. 2003) (holding *Hill*'s notification requirement

As we discussed *supra* and first articulated in *Long*, the interests underlying the AEDPA's statute of limitations that are applicable to § 2255 motions are furthered, not hindered, by courts exercising discretionary power *sua sponte* in post-answer cases such as those before us here. *See Long*, 393 F.3d at 402-03 (identifying interests of judicial economy and finality of judgments); *Robinson*, 313 F.3d at 137 (identifying "precious legal and judicial resources"). *See also Banks*, 271 F.3d at 533 n.4 (recognizing the public reputation of judicial proceedings and the public interest generally); *Kapral*, 166 F.3d at 571 (recognizing "Congress['] inten[t] to reduce . . . delayed and repetitive [habeas] filings") (internal quotation omitted).

Finally, we consider the argument *contra*, a thumbnail sketch of which is this: Habeas cases are civil, governed by the Federal Rules of Civil Procedure. As such, the AEDPA statute of limitations must be treated like any other in a civil case. Therefore, it is a defense possessed by the habeas respondent alone, and courts may not intervene.

The argument plainly rests on the premise that habeas cases and ordinary civil cases are indistinguishable, something we disagreed with in *Long* and do so again today. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 293-94, 89 S.Ct. 1082, 1087-88, 22 L.Ed.2d

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applies to habeas movants represented by counsel as well as those proceeding *pro se*).

281 (1968) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' . . . But the label is gross and inexact. Essentially, the proceeding is unique. Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense.") (internal citations and footnote omitted); *Long*, 393 F.3d at 402 ("While civil in nature, habeas corpus cases are different from ordinary civil cases where only the interests of the parties are involved.") (citing *Acosta*, 221 F.2d at 123); *see also O'Brien v. Moore*, 395 F.3d 499, 505 (4th Cir. 2005) (noting the unique hybrid nature of habeas actions and collecting cases observing same); *Walker v. O'Brien*, 216 F.3d 626, 636 (7th Cir. 2000) (observing that habeas cases are a "group unto themselves"); *Brown v. Vasquez*, 952 F.2d 1164, 1169 (9th Cir.1991) (noting habeas corpus is "dramatically different from any other type of civil action").

As to the claim that the AEDPA statute of limitations is the government's alone to use or lose, we have found no authority supporting such exclusivity. Certainly, we have been cited to none. As such, we must doubt that Congress intended to relegate the efficacy of its reforms to the vagaries of a prosecutor's decisions or mistakes.[16] Similarly, we

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[16] For this reason, federal habeas courts acting *sua sponte* need not invite the government to amend an answer pursuant to Rule 15(a), nor wait to see if the government responds. *See also Carlisle v. United States*, 517 U.S. 416, 437, 116 S.Ct. 1460, 1471, 134 L.Ed.2d 613 (1996) (Stevens, J., dissenting) ("It is quite wrong

discern no Congressional intent to hamstring courts in carrying out its reforms. The better conclusion is that Congress did not render the courts powerless.[17]

For all of these reasons, we reaffirm *Long* and hold that courts have the power to raise the AEDPA limitations issue *sua sponte* in cases arising under 28 U.S.C. §§ 2254 and 2255.

(3) What remains are our final two main issues and their application to the cases before us. For analytical purposes, they may be combined: Given the courts' power to raise the AEDPA statute of limitations *sua sponte*, at what stages may they do so, and does it matter if the government has waived?

. . . to assume that a judge is nothing more than a referee whose authority is limited to granting or denying motions advanced by the parties."). And while government prosecutors have both prosecutorial discretion and heightened ethical duties to do justice, such considerations do not justify subordinating judicial power to the presence or absence of the AEDPA limitations defense in a government answer or motion.

[17] If nothing else, if the power exists, there is nothing to suggest that Congress has taken it away. While Congress may limit the courts' inherent powers, we should not "lightly assume that Congress intended to do so." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991) (internal quotation omitted). Here, the statutory language and legislative history are silent, and "something far more than ambiguous silence is required to withdraw a district court's inherent power." *Carlisle*, 517 U.S. at 449, 116 S.Ct. at 1477 (Stevens, J., dissenting).

We hold the answer is once again provided by our decision in *Long*. Our analysis there presents no obvious reason why, given notice and an opportunity to respond, and absent prejudice to the habeas petitioner or movant, a court's exercise of its *sua sponte* powers should be limited to only the Rule 4 period.[18] The spectrum of interests that we identify in *Robinson*, *Long*, and this opinion today – finality and judicial efficiency, most notably, but also the public interest and the public reputation of judicial proceedings – are just as ably advanced post-answer as pre-answer when an untimely case is dismissed upon a district court's own motion. Recognition of this disentangles the overriding federal, judicial, and societal interests that are relevant to our analysis from those that concern the parties alone. Further, as we have stated, such an approach is not only most faithful to Congress' 1996 habeas reforms, but it is also most certainly not inconsistent with existing

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[18] Although we have not yet had occasion to reach the question, other courts of appeals have held the AEDPA statute of limitations constitutional in the face of *per se* challenges brought under the Suspension Clause of the United States Constitution, Art. I, § 9, cl. 2. *See, e.g., Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1217 and n.3 (collecting cases). *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (AEDPA's restrictions on successive petitions "do not amount to a 'suspension' of the writ"); *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed. 411 (1977) (holding that the Suspension Clause is violated only where habeas corpus is rendered "inadequate or ineffective").

authority. We have been cited to nothing that requires the inherent *sua sponte* power to terminate at the conclusion of the Rule 4 period, and we can find no such authority ourselves.

The above considerations, which we fully articulated in *Long*, are no less persuasive in instances where the government has either waived the limitations defense or so concedes. Not only are habeas cases different, but, as for the AEDPA limitations provision, the government can claim no monopoly on its use.

To conclude otherwise asks too much of waiver, which occurs only upon the "'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed 1461 (1938)). Unlike ordinary civil litigation, the practical reality of habeas is that the government may lack, for long periods of time, the file documents necessary to knowledgeably analyze timeliness. As *amicus* Federal Defender observes, habeas cases present "sometimes difficult questions of time computation." Brief of *Amicus* at 13. Indeed, the Supreme Court has explained:

> [D]istrict judges often will not be able to make [AEDPA limitations] calculations based solely on the face of habeas petitions . . . . [As] [s]uch calculations

> depend on information contained in documents that do not necessarily accompany the petitions.

Pliler v. Ford, 542 U.S. 225, 124 S.Ct. 2441, 2446, 159 L.Ed.2d 338 (2004) (citation omitted). The result is that, all too easily, habeas respondents and courts may "err in their calculation . . . ." *Id.* at 2447. Even when the record papers are obtained, it can be difficult to decipher what a *pro se* habeas movant has done, meaning many "waivers" will not actually have been "the result of a purposeful or deliberate decision to forego the defense." *Scott*, 286 F.3d at 931 (Stafford, J., dissenting).[19]

For these reasons and others, *Long* correctly instructs that the analysis in the first instance turns not on waiver, but rather on whether courts have the inherent power to protect themselves from habeas abuse, post-answer, consistent with Congress' intent,

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[19] For these reasons, as a matter of elapsed time, the first practicable chance to knowledgeably raise a timeliness issue often arises later in the life of a habeas case than it would in an ordinary civil one. Thus we have already recognized the need for a longer pre-waiver period in habeas. *See Robinson*, 313 F.3d at 136-37 (allowing post-answer raising of the defense at the "earliest practicable moment"). *Long*, consistent with *Robinson*, then confirmed that prejudice is the "ultimate issue." *See Long*, 393 F.3d at 401. Our earliest practicable moment standard in *Robinson* and our prejudice standard in *Long* correctly balance the realities summarized in *Pliler*, 124 S. Ct. at 2446, and a habeas petitioner's due process rights.

and whether, where a court exercises that power, the habeas movant is prejudiced.

(4) With these precepts in mind, we turn to the cases before us. In *Bendolph*, a judgment entry of this Court was intentionally and impermissibly altered by someone involved in filing Bendolph's petition for a writ of *certiorari*, to conceal the untimeliness of a Supreme Court filing. Such an act should not, of course, be countenanced in any way. Without doubt, the ability of a court to deal with such a circumstance is inherently within its *sua sponte* powers, and does not depend on the responding party's position.

The issue before us, however, is whether the District Court could raise the AEDPA limitations issue on its own motion, and, if so, whether the exercise of that power was limited by a government waiver. For the reasons we have discussed above, we conclude that the District Court did possess the power to flag the issue *sua sponte*, and that even if the government's actions did constitute waiver, that waiver could not have limited the court's exercise of its power.[20]

The questions remaining are (i) whether the District Court provided Bendolph with adequate notice of the issue and an opportunity to respond,

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[20] We do not reach the issue of whether the government's actions constituted an inadvertent waiver, intentional waiver, or no waiver because, no matter the answer to that question, the court possessed the ability to act *sua sponte*.

and (ii) whether Bendolph was prejudiced by the District Court's motion. The record shows that the District Court's August 24, 2000 order placed both Bendolph and the government on notice, both by raising the timeliness issue and by articulating the reasons why Bendolph's filing appeared untimely. In that same order, the District Court expressly invited the parties to brief or otherwise respond to its analysis. Bendolph was given until September 21, 2000 to respond. That the District Court's order constituted sufficient notice and provided sufficient time and opportunity to respond is evidenced by the fact that Bendolph filed his memorandum in response two weeks early, on September 8, 2000. The District Court subsequently received a letter submission from the government on October 5, 2000. It then denied Bendolph's § 2255 motion as untimely about three months later, on January 3, 2001. On these facts, we hold that Bendolph was provided adequate notice of the timeliness issue, as well as adequate opportunity to respond.

Because the District Court flagged timeliness after the Rule 4 period had ended, we must next consider "the ultimate issue," prejudice to Bendolph. *Long*, 393 F.3d at 401. We look first to how late in the case the limitations issue was raised. *Id.* Here, as stated, the District Court raised the issue on August 24, 2000; the government, in turn, did so on October 5, 2000. These two events occurred almost two years after October 18, 1998, the date Bendolph filed his §

2255 motion. During that time, the record reflects the following activity in Bendolph's case: he filed a motion to compel discovery, which was denied; the case was reassigned upon the retirement of the District Judge; and Bendolph was ordered to make an election pursuant to *United States v. Miller*, 197 F.3d 644 (3d Cir. 1999). On these facts, the raising of timeliness was not so late that Bendolph was prejudiced. There is no evidence that he had commenced costly or time-consuming discovery, suffered a loss or a diminution of his ability to prepare his case, or lost another litigation opportunity elsewhere. As such, while "[d]elay is related to prejudice," and while a period of almost two years may be strong evidence of prejudice in another case, "[it] was not a problem here." *Long*, 393 F. 3d at 401. The prejudice inquiry looks next to whether Bendolph had sufficient opportunity to respond to the issue, once raised. *See id.* We have already discussed this in our analysis of notice; such opportunity was plain from the District Court's August 24, 2000 order and Bendolph's memorandum in response. There is no problem here, either.

Finally, we consider whether the government acted in bad faith. Just as it would be unfair to ascribe the altered judgment entry date to Bendolph himself, rather than someone acting on his behalf, it would also be unfair to suggest that the government's

delay was improper.[21] *See Long*, 393 F.3d at 401 ("[i]nadvertence does not equal bad faith").

No prejudice arising from the District Court's *sua sponte* flagging of the issue, and notice and an opportunity to respond having been shown on this record, we affirm the District Court's dismissal of the § 2255 motion in *Bendolph* as untimely.

This leaves *Otero*. We have already reversed and remanded for failure to appoint counsel, as discussed *supra*. As to the remaining issue of whether the District Court may consider the apparent untimeliness of Otero's § 2255 motion *sua sponte* on remand, we answer in the affirmative, provided the District Court gives notice, an opportunity to respond, and a prejudice analysis consistent with this opinion and our prior decision in *Long*.[22]

D.

In conclusion, we hold that, upon finding a potential AEDPA statute of limitations problem in a habeas case arising under 28 U.S.C. §§ 2254 or 2255, a

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[21] At the time, we had not yet rendered our decision in *Kapral, supra*, and in any event the petition for *certiorari* had been improperly altered.

[22] Although the issue has not been raised before us, it appears that the delay in *Otero* may exceed that in *Bendolph* and *Long*, as Otero filed his § 2255 motion on June 25, 2001. As noted, delay alone is not dispositive and must be considered along with the other components of prejudice that we identified in *Long* and reaffirm today.

court may act *sua sponte* at any point in the proceedings, regardless of the government's position, provided the court (i) gives notice of the issue and an opportunity to respond; and, (ii) if the case has passed the Rule 4 stage, also analyzes the prejudice components of Rule 15(a) and *Long* that we reaffirm today.[23] The application of these mandatory requirements, like the determination of timeliness itself, remains subject to plenary review. *See Long*, 393 F.3d at 396. What remains, including whether to raise timeliness *sua sponte* in the first place, and, if so, whether to invite the government to amend its answer or not, remains within the district courts' sound discretion and will not be disturbed absent an abuse of that discretion. *Id.*

For the foregoing reasons, the January 3, 2001 order of the District Court dismissing the § 2255 motion of Herbert Bendolph is affirmed, and the February 4, 2002 order of the District Court dismissing the § 2255 motion of Julio Otero and denying his ineffectiveness of counsel claim is reversed and remanded to the District Court for further proceedings consistent with this opinion.

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[23] We leave for another day whether or not a district court may apply the statute of limitations if the government has *intentionally* waived this defense and continues to do so after the district court has raised the issue.

NYGAARD, Circuit Judge, with whom Judges SLOVITER, MCKEE, AMBRO and FUENTES join, concurring in part and dissenting in part:

I concur with the majority that we must reverse the dismissal of Otero's ineffective assistance of counsel claim and remand for the District Court to decide whether Otero is indigent and qualifies for appointed counsel. I concur with the majority that, subject to notice and an opportunity to be heard, a district court may dismiss a habeas petition *sua sponte* as part of its preliminary consideration pursuant to Rule 4 of the rules governing both section 2254 and section 2255 cases. I also concur with the majority that the one year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2244(d)(1), 2255, is subject to waiver as a defense by the government. *See Robinson v. Johnson*, 313 F.3d 128, 134 (3d Cir. 2002). But thereafter the majority and I part company. I dissent from the majority's holding that a district court has the authority to raise AEDPA's statute of limitations *sua sponte* after the government has failed to raise that affirmative defense in its answer to the petition.

I.

As an initial matter, I would remand Bendolph's petition for a factual finding on the equitable tolling claim he raised on appeal. As explained by the majority, the Clerk of the Supreme Court mistakenly filed Bendolph's untimely petition

for *certiorari* because the date on the copy of our judgment entry had been altered, making the petition appear timely. Because the Clerk did not reject his *certiorari* petition as untimely, Bendolph believed, in error, that AEDPA's statute of limitations did not begin to run on his habeas petition until one year from the date the Supreme Court denied *certiorari*. Bendolph, therefore, did not file his habeas petition within one year of the date his conviction actually became final as AEDPA requires. *See* 28 U.S.C. § 2255. On appeal before the panel, he argued that the mistaken filing of his *certiorari* petition by the Clerk of the Supreme Court is grounds for equitable tolling of AEDPA's statute of limitations. Because it is unclear who altered the record, we cannot know whether equitable tolling is appropriate and we should remand for further factual findings.

AEDPA's statute of limitations is subject to equitable tolling. *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001). Out of a sense of equity, we will toll the statute of limitations when a petitioner demonstrates reasonable diligence in bringing a claim, but "has in some extraordinary way been prevented from asserting his or her rights." *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618. In non-capital cases, "attorney error, miscalculation, inadequate research, or other mistakes have not been found [by this Court] to rise to the 'extraordinary' circumstances required for equitable tolling." *Fahy*, 240 F.3d at 244. We have also held, however, that there are "narrow

circumstances in which misbehavior of an attorney may merit such equitable relief." *Seitzinger v. Reading Hosp. & Med. Cent.*, 165 F.3d 236, 239 (3d Cir. 1999). For instance, in *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), a habeas petitioner accused his attorney of leading him to believe that the attorney would file a habeas petition on his behalf, and of telling him that there were no time constraints on habeas petitions. *Id.* We found that, if true, the allegations "may constitute extraordinary circumstances to justify equitable tolling." *Id.* Nevertheless, because the Court was unable to determine the validity of the accusations, it remanded for a factual finding. *Id.*

Like in *Nara*, a remand is presently appropriate. Although it is unclear who altered the date on this Court's judgment entry, the alteration misled the Clerk of the Supreme Court to believe that Bendolph's petition for *certiorari* was timely. It is entirely possible that the alteration is the result of clerical error. Indeed, there is no evidence in the record that Bendolph's federal public defender altered the document herself, innocently or otherwise. Nor is there evidence that she purposefully or knowingly submitted an altered document to the Clerk of the Supreme Court. If the federal public defender altered the document, her actions would be sufficiently serious to constitute an "extraordinary" prevention of Bendolph's ability to assert his rights that would merit equitable tolling. I believe it patently unfair of the majority to acknowledge the

altered date and then simply affirm the District Court without permitting Bendolph the opportunity to show that he was misled into believing he had time to file his habeas petition. Because the record does not permit us to determine who is responsible for the alteration, we should remand for the District Court to make factual findings, and for it to determine whether the statute of limitations should be tolled. Under these circumstances, there is a possibility that Bendolph's petition was indeed timely.

II.

In the event the petitions were untimely, Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts requires that an answer to a habeas petition "*must* state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, *or a statute of limitations*." Section 2254 Rule 5(b) (emphasis added).[24] The phrase "statute of limitations" was

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[24] Although Rule 5(b) of the Section 2255 Rules does not require the government to state whether any statute of limitations applies, as the majority points out, "we have followed the practice, whenever we decide an AEDPA issue that arises under § 2254 and the same holding would analytically be required in a case arising under § 2255, or vice versa, of so informing the district courts." *Miller*, 145 F.3d at 619 n.1. I agree with the majority that on the question of a district court's continuing authority (or lack thereof) to raise the statute of limitations *sua sponte* after the government's answer, we should treat section 2254 and section 2255 cases the same. I reach a different conclusion as to that question, of course.

added to Rule 5(b) in December 2004 as part of a "stylistic" change meant to reflect the existing state of the law. *See* Section 2254 Rule 5, cmt.

At the time of the amendment, the Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits had addressed the effect of the government's failure to raise the AEDPA statute of limitations in its answer on a district court's authority to subsequently raise the issue *sua sponte*. In *Scott v. Collins*, 286 F.3d 923, 927 (6th Cir. 2002), the Sixth Circuit held that because AEDPA's statute of limitations is an affirmative defense, "Rule 8(c) of the Federal Rules of Civil Procedure requires that [the government] raise it in the first responsive pleading to avoid waiving it."[25]25 The Court held that the government's failure to raise the statute of limitations in its answer divests the district court of its authority to raise the defense *sua sponte*. *Id.* at 930. It explained that a contrary rule would amount to "an impermissible curing of [the government's] waiver." *Id.* The Ninth Circuit applied similar reasoning in *Nardi v. Stewart*, 354 F.3d 1134

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[25] The Federal Rules of Civil Procedure may be made applicable to habeas cases "to the extent they are not inconsistent with any statutory provisions or [the Habeas] rules." Section 2254 Rule 11; *see* Section 2255 Rule 12. Applying Civil Procedure Rule 8(c), which mandates that parties set forth any affirmative defenses they might have—including the statute of limitations—in a responsive pleading, is consistent with the mandate of Rule 5(b) of the Section 2254 Rules that the government shall state in its answer whether the petition is barred by a statute of limitations.

(9th Cir. 2004). It held that a "district court lacks the authority to *sua sponte* dismiss a habeas petition as time-barred after the state files an answer which fails to raise the statute of limitations defense." *Id.* at 1141. By contrast, the Eleventh Circuit, in *Jackson v. Secretary for the Department of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002), held without any analysis that the government's failure to raise the statute of limitations in its answer has no effect on a district court's ability to raise the issue *sua sponte*. Thus, at the time of this Court's decision in *Long v. Wilson*, 393 F.3d 390 (3d Cir. 2004), there existed a circuit split. In *Long*, we sided with the Eleventh Circuit, *id.* at 403, and today the majority reaffirms that choice, albeit in the context of a section 2255 petition rather than a section 2254 petition. We are on the wrong side of the split between the circuits.

Underlying the *Scott* and *Nardi* decisions is the rule that generally it is not appropriate for a court to *sua sponte* raise nonjurisdictional defenses not raised by the parties. *See Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) ("Generally, courts should not raise *sua sponte* nonjurisdictional defenses not raised by the parties."); *cf. Zelson v. Thomforde*, 412 F.2d 56, 58 (3d Cir. 1969) (holding that a court may not raise the defense of lack of personal jurisdiction—a non-jurisdictional defense because it does not concern the power of the court to entertain the suit—once the defendant has waived the issue by appearing). This rule exists because ours is an adversarial system,

which relies on advocacy by trained counsel. *Cf. United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points of law not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."). In an adversarial system, it is not for the courts to bring to light the best arguments for either side; that responsibility is left to the parties themselves. *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con *adduced by the parties*.") (emphasis added). As the Supreme Court has explained, "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, 384 U.S. 855, 875 (1966).

We should decline to raise non-jurisdictional defenses for another reason as well: fairness to the other party. Typically, it is not fair for courts to act as surrogate counsel for one side but not the other. *See United States v. Pryce*, 938 F.2d 1343, 1352 (D.C. Cir. 1991) (Silberman, J., dissenting in part) ("We thus ordinarily have no right to consider issues not raised by a party in either briefing or argument . . . because

of the unfairness of such a practice to the other party. . . ."); *see infra*, Part III.A.

Of course I acknowledge that there are exceptions to this rule of restraint. The Supreme Court has held that, in the interests of comity and federalism, courts may raise a habeas petitioner's failure to exhaust state remedies *sua sponte*, even if the government does not. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *cf. Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001) (holding that in the interests of comity and federalism a court may raise procedural default *sua sponte*). And in *Acosta v. Artuz*, a case relied upon heavily by the Court in *Long*, the Second Circuit held that courts may raise non-jurisdictional defenses *sua sponte* where "the defenses implicate values beyond the interests of the parties." *Acosta*, 221 F.3d at 121. The *Acosta* Court held that a district court may raise AEDPA's statute of limitations *sua sponte* because it believed that defense fosters finality of convictions, promotes judicial efficiency and conservation of resources, and ensures the accuracy of judgments by resolving challenges to convictions while the record is fresh. *Id.* at 123. However, when a court examines a habeas petition for facial deficiencies pursuant to Rule 4, and finding none orders the government to answer, only to have the government fail to raise timeliness as a defense, each of those values become substantially less significant. When measured against the purpose and history of

habeas corpus in our jurisprudence, those values shrink even further.

Initially, the *Long* Court noted that in considering the values beyond the interests of the parties served by AEDPA's statute of limitations, comity and federalism are the "most important[]." *Long*, 393 F.3d at 403. The logic behind this statement renders it irrelevant. Unlike the defenses of exhaustion and procedural default, statutes of limitation do not implicate the interests of comity and federalism. Those defenses are designed to ensure that state courts have "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). The same cannot be said for a statute of limitations. When a state prisoner's habeas petition is dismissed as untimely, the prisoner is not permitted to file his action in state court. Instead, he simply loses the ability to test the legality of his confinement. In the case of a section 2255 petition filed by a federal prisoner—as we have here—state courts are not involved in the trial and sentencing process whatsoever, and thus federalism and comity are simply irrelevant.

Similarly, judicial efficiency and economy are not implicated by a post-answer *sua sponte* dismissal pursuant to AEDPA's statute of limitations. If a district court reviews a petition for deficiencies pursuant to Rule 4 and does not dismiss it, and the government then fails to raise the statute of

limitations, the parties and the court begin to expend time and effort on the merits of the petition. At this point, judicial efficiency and economy are already lost. The very purpose of affirmative defenses, such as the statute of limitations, is to conserve judicial resources by requiring the parties to raise them *early* in the proceedings. *Robinson*, 313 F.3d at 134. Rescuing the government from its folly or inadvertence by permitting a district court to raise the statute of limitations after the parties have begun to address the merits of the petition subverts that purpose, and may even have the opposite effect. If the statute of limitations is raised late in the proceedings, the parties must then brief yet an additional issue, which consumes the resources of all involved. I recognize that by permitting a district court to dismiss a habeas petition as untimely, some resources may be saved. But the same can be said for dismissing any lawsuit at any point. Yet it is not the general practice of this Court to raise the statute of limitations or other affirmative defenses either in civil or criminal cases in order to conserve judicial resources.

Courts exist to resolve disputes. The resources of the courts should be used to that end. And what better use of judicial resources (or higher calling for the federal judiciary for that matter) could there be than ensuring that no one is incarcerated in violation of the law?

The majority makes a great deal of the interests of finality AEDPA was enacted to serve. There is no doubt that habeas corpus "presents a tension between the desire for finality, an end to the proceedings, and a desire to provide the chance for revisions, especially to correct errors." Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 789 (1987). As Professor Chemerinsky has pointed out, "[t]here obviously must be finality at some point; a time when the defendant has had sufficient opportunities for review and the chances of finding an error are too remote to justify further expenditure of resources." *Id.* But on the other hand, conviction of the innocent or conviction in violation of the Constitution should not be tolerated. *See id.* Even those who have strongly emphasized a preference for curbing the scope of habeas corpus have acknowledged that "conventional notions of finality" have diminished significance in the context of habeas. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) (quotation omitted).

At the earliest, AEDPA's statute of limitations begins to run when a prisoner's conviction becomes final, upon the conclusion of direct review. *See* 28 U.S.C. §§ 2244, 2255. Indeed, it may well not begin for decades if, for instance, the petitioner relies on a retroactively applicable rule of constitutional law as recognized by the Supreme Court. 28 U.S.C. §§ 2244(d)(1)(C), 2255. Moreover, AEDPA's statute of

limitations is subject to equitable tolling. *Fahy* 240 F.3d at 244. Many *timely* habeas petitions, therefore, might not be heard until years after conviction. In such a situation, the finality of the conviction is put in jeopardy—which, after all, is the very purpose of habeas review—as much as when a habeas petition is untimely filed and the government fails to raise a statute of limitations defense. Thus, concerns of finality are no more implicated after the government answers without raising timeliness than by many, if not most, habeas proceedings where timeliness is not an issue.

"In our adversary system, it is enough for judges to judge." *Dennis*, 384 U.S. at 875. Advocacy is best left to the parties. Thus, as a general rule, courts should not raise nonjurisdictional defenses on behalf of parties who do not raise the defenses for themselves. *Acosta*, 221 F.3d at 122. The Supreme Court has permitted departures from that general rule only when values beyond the interests of the parties are implicated. *See Granberry*, 481 U.S. at 131; *see also Szuchon*, 273 F.3d at 321 n.13. No such values are sufficiently implicated by a *sua sponte* dismissal for lack of timeliness where, as here, the government has failed to raise the statute of limitations in its answer.

III.

A.

Even if a *sua sponte* dismissal of the petitions in this case would serve values beyond the interests of the parties, I would still dissent because of the damage dismissal would work upon two countervailing values the majority fails to consider: the related notions of waiver and fundamental fairness.

The majority's decision renders the concept of waiver a nullity. We held in *Robinson*, 313 F.3d at 134, that AEDPA's statute of limitations is subject to waiver. In both *Bendolph* and *Otero* the government explicitly waived that defense.[26] And while the majority reaffirms our holding in *Robinson*, at the same time it effectively destroys that portion of *Robinson* by holding that the government's waiver is irrelevant. If a court may raise a non-jurisdictional defense once it has been waived, then waiver has no practical effect; it exists in theory alone. *See Haskell v. Washington Township*, 846 F.2d 1266, 1273 (6th Cir. 1988) (explaining that if a district court may raise the

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26 In *United States v. Otero*, 02-2624, counsel for the United States stated during oral argument before the panel: "We waived the statute of limitations. There's no question under this Court's *Robinson* decision that we waived the statute of limitations." (Oral Argument Tr. at 36). Similarly, in *United States v. Bendolph*, 01- 2468, counsel for the United States explained, "we waived the statute of limitations." (Oral Argument Tr. at 56).

statute of limitations *sua sponte* once it has been waived, "the waiver aspect of Rule 8(c) would have little meaning"). Thus, as a result of the majority opinion, it appears that AEDPA's statute of limitations is no longer subject to waiver.[27] I doubt very much whether courts will be so forgiving of a procedural error by a habeas petitioner.[28]

As for the issue of fairness, *Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441 (2004), is instructive. In *Pliler*, the Supreme Court reversed a decision by the Ninth Circuit, which required district courts to give *pro se* habeas petitioners a warning that if they dismiss their petitions in order to first exhaust state remedies, AEDPA's statute of limitations might bar them from

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[27] Incidentally, had Congress wanted to protect AEDPA's statute of limitations from waiver, it could have done so by statute as it did for the defense of failure to exhaust state remedies. Pursuant to 28 U.S.C. § 2254(b)(3), "[a] State shall not be deemed to have waived the exhaustion requirement . . . unless the State, through counsel, expressly waives the requirement." Congress has afforded the defense of AEDPA's statute of limitations no such protection, and even if it had, counsel for the United States explicitly waived the defense in each of these consolidated cases. The majority simply excuses that waiver, instead vesting in the district courts the discretion whether to raise the statute of limitations *sua sponte* in any given case. That grant of authority is likely to create vast disparities concerning the treatment of government waiver between judges and from one case to the next. Those disparities will in turn be visited upon petitioners.

[28] Indeed, courts routinely dismiss petitions, standing upon mere punctilios in the law.

refiling a future petition in federal court. According to the Ninth Circuit, the failure to provide the *pro se* habeas petitioner in that case with such a warning deprived him of the opportunity to make a "meaningful" choice concerning his petition. *Id.* at 2445 (citing *Ford v. Hubbard*, 330 F.3d 1086, 1102 (9th Cir. 2003)). The Supreme Court disagreed. It held that district courts need not warn *pro se* litigants that AEDPA's statute of limitations might preclude them from filing any future petitions if they withdraw a timely petition. *Id.* at 2446. According to the Court, explaining habeas procedure and calculating the statute of limitations are tasks normally reserved for trained counsel, and "[r]equiring district courts to advise a *pro se* litigant in such a manner would undermine the district judges' role as impartial decisionmakers." *Id.*

While one might argue that it is the *pro se* habeas petitioners—who are without the assistance of trained counsel—who need to be warned by district courts of AEDPA's labyrinthine pitfalls most of all, the Court's decision in *Pliler* is clear: district courts may not act as *de facto* counsel in habeas proceedings. Fairness dictates that we apply this rule equally to both sides, but the majority does not. The majority permits a district court to act as *de facto* counsel for the government, working together toward the common goal of dismissal of the petition. That is unfair. A habeas petitioner gets no help from the courts, and the government needs none either. If, as

Justice Thomas explained in *Pliler*, calculating the statute of limitations is a job ordinarily reserved for trained counsel, then that job should be left in the able hands of the government's attorneys. Any other rule contravenes the fundamental notion that "the judiciary is on *no* side. . . . We judges must be strictly neutral with respect to all cases that come before us." *Pryce*, 938 F.2d at 1352 (Silberman, J., dissenting in part).

The Court today permits and perpetuates a double standard. *Cf. Latorre v. United States*, 193 F.3d 1035, 1042 n.3 (8th Cir. 1999) (Lay, J., concurring in result only) ("It is ironic . . . that in a § 2255 case a petitioner may not raise an issue on appeal when the issue has been procedurally defaulted in the district court, yet the court expressly ignores this principle when dealing with the United States government."). It also sends a disturbing message: We will aid the government in a habeas proceeding, but not the petitioner. The mistakes of the government may be excused and ignored, but any error by the petitioner is fatal—perhaps figuratively, but too often literally. The favored-party status the majority affords to the government in habeas cases undermines both the appearance and fact of judicial neutrality, and I will have no part in it.[29]

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[29] I do not believe my colleagues in the majority intend to be less principled or less fair than I. I do believe, however, that the majority sacrifices a little of both principle and fairness at the

B.

Habeas corpus is not a luxury or an extravagance to be tolerated only when convenience permits. It is a fundamental protection of liberty "against arbitrary and wrongful imprisonment" that predates these United States. Chemerinsky, at 749. The Framers viewed it as "the highest safeguard of liberty," *Smith v. Bennett*, 365 U.S. 708, 712 (1961)—a protection against arbitrary punishment and convictions to be "provided for in the most ample manner," THE FEDERALIST NO. 83 (Alexander Hamilton). Since the 1970s, however, the road to habeas relief has "become a narrow[], more tortuous track among concealed snake-pits and anti-personnel mines calculated to daze cartographers and daunt a modern Gilgamesh." Anthony G. Amsterdam, *Foreward* to JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at v (2d ed. 1994). We continue to pile on "petty procedural barriers," resulting in a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of

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altar of expedience. Courts have admittedly crowded dockets. Those dockets include many habeas petitions, and I fear that the petitions with merit are outnumbered by those without. Any rule that would permit district courts to more easily dispose of habeas petitions might therefore seem desirable. But when individual liberty is at stake—as is the case with any habeas petition—expedience and self-interest ought not inform our decisions.

federal rights." *Coleman v. Thompson*, 501 U.S. 722, 758–59 (1991) (Blackmun, J., dissenting). This, in my view, is a great tragedy.

I constantly counsel myself and my law clerks that somewhere in the mass of usually convoluted, often marginally comprehensible *pro se* habeas petitions, there is another Clarence Earl Gideon, or one of the other faceless names for whom we do issue the Great Writ. Searching for those meritorious petitions is not only our duty, it is one of our most important. I am not alone in believing that the writ of habeas corpus may be the single most significant protection of individual rights in the Constitution. *See* Chemerinsky, at 749. I am simply adding my voice to the chorus. While technically the writ exists only as a procedural device, "its history is inextricably intertwined with the growth of fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 399–400 (1963), *abrogated on other grounds by Coleman*, 501 U.S. at 722. A threat to the writ's vitality is a threat to those very fundamental rights. "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). In the name of reducing the docket of the district courts, and seduced by the lure of a one-line order, the majority evades its sacred duty. I dissent.

SLOVITER, Circuit Judge, with whom Judges Nygaard, McKee, Ambro and Fuentes join, dissenting.

I join Judge Nygaard's dissent but wish to note additionally that the opinion in *Long v. Wilson*, 393 F.3d 390 (3d Cir. 2004), deviates from this court's well-established rule that "a holding of a published opinion of the court may not be overruled without the approval of a majority of the en banc court." Third Circuit IOP A(2). Although the opinion of the majority in this case refers to our decision in *Robinson v. Johnson*, 313 F.3d 128 (3d Cir. 2002), without overruling it, the majority relies on our subsequent opinion in *Long* which, while also purporting to accept the *Robinson* holding, in fact eviscerates it. Notwithstanding the Commonwealth's failure to timely raise the statute of limitations defense, *Long* allowed the Commonwealth to recoup that defense fourteen months later by its "endorse[ment] [of] the Magistrate Judge's view that the habeas petition was untimely." Id. at 395. The *Long* court, by applying the stratagem of a constructive Rule 15(a) amendment, effectively nullified the *Robinson* requirement that the Commonwealth assert its statute of limitations defense in a timely manner.

The only effect of holding that the Government (or the Commonwealth in an appropriate case) waived its statute of limitations defense is that the matter will proceed on the merits. If the petitioner cannot show that his or her constitutional rights have

been violated, the District Court will undoubtedly grant summary judgment for the Government in short order. If the petitioner has sufficient evidence of a violation of his or her rights, then the purpose of the habeas corpus statute will have been fulfilled.

Unlike the majority, I do not believe that "the public interest and the public reputation of judicial proceedings" will suffer if this court holds the Government to its waiver of the statute of limitations. Maj. Op. at 25. Indeed, it should only enhance its reputation by applying the procedural rules equally to petitioners and to the Government.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HERBERT L. BENDOLPH — No. 95-68-SLR

Petitioner, — No. 98-601-SLR

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION

Dated: January 2, 2001
Wilmington, Delaware

I. INTRODUCTION

Petitioner Herbert L. Bendolph is an inmate at the Marianna Federal Correctional Institution in Marianna, Florida. (D.I. 78) Currently before the court is petitioner's application for habeas corpus relief filed pursuant to 28 U.S.C. § 2255. Because petitioner's application was not timely filed, the court shall dismiss it without reaching its merits.

II. BACKGROUND

On January 31, 1996, petitioner was convicted in federal court of one count of possession of a firearm by a felon. (D.I. 41) In October 1996, petitioner was sentenced to 235 months imprisonment. (D.I. 54) On May 2, 1997, the Third Circuit affirmed petitioner's conviction.[1] (D.I. 63) Defendant filed a petition for certiorari on August 28, 1997, which was denied by the United States Supreme Court on October 20, 1997. (D.I. 64; *Bendolph v. United States*, 522 U.S. 939, 139 L. Ed. 2d 273, 118 S. Ct. 352 (1997)) Petitioner's instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is dated October 18, 1998. (D.I. 65)

III. DISCUSSION

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996).[2] AEDPA amended 28 U.S.C. § 2255 to impose a one-year statute of limitations on the filing of a § 2255 motion by a federal prisoner. See 28 U.S.C. §

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[1] The court's August 22, 2000 order (D.I. 84) listing the date of affirmance as May 5, 1997 is incorrect.

[2] Since petitioner's sentence was entered on October 2, 1996 and he filed his § 2255 motion in October 1998, AEDPA applies to petitioner without any retroactivity problem. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997).

2255; *Miller v. New Jersey State Dep't of Corrs.*, 145 F.3d 616, 619 n.1 (3d Cir. 1998) (holding that one-year limitations period set forth in § 2255 is statute of limitations subject to equitable tolling, not jurisdictional bar). The one-year limitations period begins to run from the latest of:

> (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the [constitutional] right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Applying these standards to the case at bar, the statute of limitations with respect to petitioner began to run on July 31, 1997, the date on which petitioner's time for filing a timely petition for certiorari review expired. See U.S. Supr. Ct. R. 13; *Kapral v. United States*, 166 F.3d 565, 575, 577 (3d Cir. 1999) (holding

that judgment becomes "final" in context of § 2254 and § 2255 "on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires"). Petitioner, therefore, had until July 30, 1998 to file his application for habeas relief. Since petitioner filed his habeas petition on October 18, 1998,[3] the court concludes that his application is untimely.

Petitioner argues that since his certiorari petition was denied on October 20, 1997, he had one year from that date to file his habeas application. However, the statute of limitations runs from the denial of a timely-filed petition for certiorari, not a late one. *See Kapral,* 166 F.3d at 569. In this case, petitioner filed a petition for certiorari on August 28, 1997, after the ninety-day deadline of July 31, 1997. Thus, petitioner's statute of limitations began to run from the date his time for filing a certiorari petition expired.

Furthermore, any mistake or miscalculation by

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[3] Courts in this district have treated the date the petition was signed (in the absence of proof of mailing) as the relevant date for purposes of calculating compliance with the limitations period. *See, e.g., Murphy v. Snyder,* 2000 U.S. Dist. LEXIS 21931, Civ. A. No. 98-415-JJF, at 4 (D. Del. Mar. 8, 1999).

petitioner's counsel regarding the applicable statute of limitations does not warrant equitable tolling. *See, e.g., Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (holding that attorney's miscalculation based on "interpretation of novel legal issue" of habeas limitations period is not basis for equitable tolling); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (holding that counsel's confusion about applicable statute of limitations does not warrant equitable tolling for filing habeas petition); *Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000) (same); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (same). [4]

IV. CONCLUSION

For the aforementioned reasons, the court shall deny petitioner's applications for habeas corpus relief. An appropriate order shall issue.

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[4] Petitioner also contends that he filed his petition for certiorari prior to May 3, 1999, the effective date of Supreme Court Rule 13.2, which requires the Supreme Court Clerk to refuse to file untimely petitions. If Rule 13.2 had been in effect in 1997, petitioner argues, the Supreme Court Clerk would have refused to file his petition for certiorari, thereby notifying him (and his attorney) that his petition was untimely. This argument is unpersuasive since it does not excuse the fact that his petition for certiorari was untimely under the rules.

ORDER

At Wilmington, this 2nd day of January, 2001, consistent with the memorandum opinion issued this same day,

IT IS ORDERED that:

1. Petitioner Herbert L. Bendolph's above captioned application for habeas corpus relief (D.I. 65) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

/s/ Sue L. Robinson
Sue L. Robinson
United States District Judge

APPENDIX C

28 U.S.C. § 2255 provides in pertinent part as follows:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1) provides in pertinent part as follows:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Supreme Court, U.S.
FILED
SEP 1 - 2005
OFFICE OF THE CLERK

No. 05-3

In the Supreme Court of the United States

HERBERT L. BENDOLPH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a collateral challenge pursuant to 28 U.S.C. 2255, a district court has authority to raise *sua sponte* a potential statute of limitations issue where the government did not raise the statute of limitations in its response to the Section 2255 motion.

2. Whether the court of appeals erred in affirming the dismissal of petitioner's Section 2255 motion as untimely without remanding the case for an evidentiary hearing on the question whether the limitations period should have been equitably tolled.

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In the Supreme Court of the United States

No. 05-3

HERBERT L. BENDOLPH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-55a) is reported at 409 F.3d 155. The opinion of the district court (Pet. App. 56a-61a) is not reported in the *Federal Supplement* but is *available at* 2001 WL 641084.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2005. The petition for a writ of certiorari was filed on June 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted of possessing a firearm as a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to a term of 235 months of

imprisonment. The court of appeals affirmed. *United States* v. *Bendolph*, 116 F.3d 470 (3d Cir. 1997) (Table). This Court denied review. *Bendolph* v. *United States*, 522 U.S. 939 (1997).

On October 18, 1998, petitioner filed a motion to correct, vacate, or set aside his sentence under 28 U.S.C. 2255. The district court dismissed the motion as time-barred. Pet. App. 56a-61a. A panel of the court of appeals heard argument, but before the panel issued a decision, the court of appeals heard the case en banc and affirmed. *Id.* at 1a-55a.[1]

1. On January 31, 1996, following a jury trial in the United States District Court for the District of Delaware, petitioner was found guilty on one count of possessing a firearm as a previously convicted felon. Petitioner was sentenced to a term of 235 months of imprisonment. See 01-2468 Pet'r C.A. Br. 2.

Petitioner appealed, challenging the district court's denial of a suppression motion and the court's modification, on the government's motion, of the transcript of the suppression hearing. See 97-7104 Pet'r C.A. Br., 1997 WL 33710229, at *1-*3. On May 5, 1997, the court of appeals affirmed by judgment order. *United States* v. *Bendolph*, 116 F.3d 470 (3d Cir. 1997) (Table). On May 27, 1997, the court of appeals issued a certified copy of its judgment in lieu of a formal mandate. C.A. App. 20a-21a.[2] On August 25, 1997, petitioner sought review

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[1] In the en banc court, petitioner's case was consolidated with *United States* v. *Otero*, No. 02-2624 (3d Cir.). The court of appeals' disposition of *Otero*, see Pet. App. 10a-11a, 34a, does not affect the issues raised in the petition.

[2] Citations to "C.A. App." and "C.A. Supp. App." are to the Joint Appendix and Supplemental Appendix filed in the Third Circuit in No.

in this Court, see C.A. App. 22a-59a; the petition was filed 89 days after the court of appeals issued a certified copy of the judgment in lieu of a formal mandate, but more than 90 days after the court of appeals entered its judgment. In at least two places, the certiorari petition suggested that May 27, 1997, was the effective date of the judgment of the court of appeals. See C.A. App. 28a, 29a; see also 01-2468 Pet'r C.A. Br. 2-3; 01-2468 Gov't C.A. Br. 1-2. This Court denied review on October 20, 1997. *United States* v. *Bendolph*, 522 U.S. 939 (1997).[3]

2. a. On October 18, 1998, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See C.A. App. 60a-74a. With respect to the timing of his direct appeal, the pro se motion did not provide a date for the judgment of the Third Circuit but stated that this Court denied his petition for a writ of certiorari on October 20, 1997. See *id.* at 61a.[4] Two weeks after the petitioner filed the Section 2255 motion, the district court ordered the government to file a response. Pet. App. 7a, 13a. On

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01-2468, petitioner's appeal of the district court's denial of his Section 2255 motion.

[3] In the present collateral proceeding, the United States did not challenge petitioner's assertion in the court of appeals, see 01-2468 Pet'r C.A. Br. 3-5, that his petition for a writ of certiorari to this Court on direct review contained an apparently altered version of the certified judgment entered by the court of appeals in lieu of a formal mandate. See 01-2468 Gov't C.A. Br. 1-2 & n.2. The government did challenge petitioner's assertions about the origin of the alteration, noting that those assertions, which were based on extra-record interviews by petitioner's current appellate counsel, were without factual support in the record. See *id.* at 1-2.

[4] On a form for Section 2255 motions, petitioner wrote "AFFIRMATION OF CONVICTION (?) DENIAL OF CERT, 10/20/97," next to the question inquiring about the "Date of result" of his direct appeal. C.A. App. 61a.

December 17, 1998, the government responded to the merits of the claims in the motion without addressing the one-year statute of limitations in Section 2255. See C.A. App. 75a-85a; 28 U.S.C. 2255 para. 6. On January 14, 1999, petitioner moved to compel discovery. On March 15, 1999, the government responded to the motion without referring to Section 2255's statute of limitations. See C.A. App. 86a-90a. On April 21, 1999, the district court denied the motion to compel. See *id.* at 14a. In August 1999, the matter was reassigned to another district court judge. See Pet. App. 7a-8a; C.A. App. 14a.

b. In August 2000, the district court *sua sponte* entered an order reviewing the record as it related to the timeliness of petitioner's motion and noting that the motion appeared to be time-barred under the statute of limitations established in Section 2255 by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105(2), 110 Stat. 1220. See C.A. App. 91a-93a. The court requested the parties' views on the issue. *Id.* at 93a. In its response of September 28, 2000, the government adopted the court's analysis and contended that petitioner's Section 2255 motion should be denied as time-barred. See *id.* at 94a. Petitioner responded pro se, contending that his motion was timely as measured by the date that his certiorari petition was denied and, in the alternative, that the statute of limitations should be equitably tolled because of the errors of his counsel on direct review. See *id.* at 95a-99a; C.A. Supp. App. SA3-SA7. Petitioner did not object to the district court's consideration of the timeliness issue. See C.A. App. 95a-99a; C.A. Supp. App. SA3-SA7.

The district court denied petitioner's Section 2255 motion as untimely. Pet. App. 56a-61a. The court ruled that because petitioner's certiorari petition on direct review was filed late, the statute of limitations period in Section 2255 began to run on the date that the certiorari petition should have been filed, rather than on the date this Court denied review. See *id.* at 58a-59a (citing *Kapral* v. *United States*, 166 F.3d 565, 575, 577 (3d Cir. 1999)). The court concluded that, by that measure, petitioner's Section 2255 motion was filed beyond the applicable one-year statute of limitations. See *ibid.*[5] The district court also declined to equitably toll the statute of limitations period, reasoning that "any mistake or miscalculation by petitioner's counsel regarding the applicable statute of limitations does not warrant equitable tolling." *Id.* at 59a-60a (collecting cases).

3. Petitioner appealed, and the court of appeals granted a certificate of appealability. See Pet. 4 n.12. After a three-judge panel heard argument but before issuance of an opinion, the court of appeals heard the case en banc with another pending case raising similar issues. See Pet. App. 4a-5a; see also note 1, *supra*.

a. The en banc court of appeals affirmed. See Pet. App. 1a-35a. The court first held that Section 2255's "limitations period is not jurisdictional and therefore is subject to equitable considerations such as waiver." *Id.* at 21a. Nevertheless, the court of appeals held that the United States' failure to raise the statute of limitations defense in its answer did not deprive the district court of the power to raise the issue *sua sponte*. *Id.* at 11a-35a.

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[5] Petitioner does not challenge that conclusion in this Court.

Relying on its decisions in *Long* v. *Wilson*, 393 F.3d 390 (3d Cir. 2004), petition for cert. pending, No. 04-10035 (filed May 6, 2005), and *Robinson* v. *Johnson*, 313 F.3d 128 (3d Cir. 2002), cert. denied, 540 U.S. 826 (2003), which addressed similar issues in habeas cases under 28 U.S.C. 2254, the court reasoned that "the interests underlying the AEDPA's statute of limitations that are applicable to § 2255 motions are furthered, not hindered, by courts exercising discretionary power *sua sponte* in post-answer cases." Pet. App. 25a. The court noted that these interests include furthering the finality of judgments, preserving judicial resources, curbing the abuse of the writ of habeas corpus, and promoting the public reputation of judicial proceedings and the public interest generally. *Ibid.*; see *id.* at 17a-20a, 28a-29a.

The court rejected the argument that "the AEDPA statute of limitations is the government's alone to use or lose," and that courts may not act on their own motion. Pet. App. 26a. The court observed that this argument rested on the mistaken premise that Section 2255 proceedings were indistinguishable from ordinary civil cases. See *id.* at 25a. The court further noted that, "[u]nlike ordinary civil litigation, the practical reality of habeas is that the government may lack, for long periods of time, the file documents necessary to knowledgeably analyze timeliness." *Id.* at 29a.

Accordingly, the court of appeals held that a district court has the authority in Section 2255 proceedings to raise *sua sponte* AEDPA's statute of limitations, either before or after an answer has been filed, as long as it provides notice and an opportunity to respond. Pet. App. 28a-31a. The court of appeals further held that, if the district court raises the issue after a response has been filed that does not raise a statute of limitations

defense, the district court must examine whether the habeas petitioner will be prejudiced by the delay in raising the issue. See *id.* at 30a-31a.

Applying these principles to petitioner's case, the court held that the district court had the power to flag the potential statute of limitations issue *sua sponte*, even if the government's actions constituted waiver;[6] that the district court had provided petitioner with sufficient notice of, and a sufficient opportunity to respond to, the district court's raising of the timeliness issue; that the district court's raising of the issue was not so late that petitioner was prejudiced; and that the government's delay in raising the issue had not been in bad faith. See Pet. App. 31a-34a. Accordingly, the court affirmed the district court's dismissal of petitioner's Section 2255 motion as untimely. See *id.* at 34a.

b. Judge Nygaard filed an opinion dissenting in relevant part, see Pet. App. 36a-53a, and Judge Sloviter filed a dissenting opinion. See *id.* at 54a-55a. The other dissenting judges joined both dissents. See *id.* at 36a, 54a. Judge Nygaard would have remanded the case for an evidentiary hearing on equitable tolling, see *id.* at 36a-39a, and believed that the government had waived the statute of limitations issue by failing to raise it in its response to the Section 2255 motion. See *id.* at 39a-47a. In Judge Nygaard's view, the majority's decision rendered the concept of waiver a nullity and

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[6] Although during oral argument before the three-judge panel, the United States acknowledged that it had waived the statute of limitations within the meaning of the Third Circuit's decision in *Robinson*, see Pet. App. 48a n.26 (Nygaard, J., dissenting), the United States argued to the en banc court that it had not waived the statute of limitations in light of the Third Circuit's subsequent interpretation of *Robinson* in *Long*. See Gov't C.A. Supp. Br. 4 & n.1.

impermissibly permitted the district court to act as *de facto* government counsel. See *id.* at 48a-52a. Judge Sloviter contended that the majority's reliance on the Third Circuit's decision in *Long*, which permitted a respondent to adopt a magistrate's *sua sponte* raising of the limitations issue as a constructive amendment to its answer, eviscerated the Third Circuit's holding in *Robinson*, which required that the statute of limitations defense be asserted in a timely manner. See *id.* at 54a-55a.

ARGUMENT

1. Petitioner contends (Pet. 8-19) that the Third Circuit's decision conflicts with that of other courts of appeals on the question whether, in habeas cases, a district court may *sua sponte* raise the statute of limitations where the respondent has answered the petition without asserting that the petition is untimely. The decision below is correct, and this case is not a suitable vehicle for resolving the tension in the courts of appeals identified by petitioner. The petition should be denied.

a. The court of appeals' decision is correct, whether viewed through the prism of the special rules that apply to Section 2255 proceedings or the rules that apply to ordinary civil cases.

i. The Rules Governing Section 2255 Proceedings (Section 2255 Rules) expressly authorize a district court to consider, on its own initiative, whether grounds exist for dismissal of a Section 2255 motion. The current version of Rule 4(b) provides that "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion."

Section 2255 Rules, Rule 4(b);[7] see 28 U.S.C. 2255 (permitting courts to dispose of a Section 2255 motion without "caus[ing] notice thereof to be served upon the United States attorney" and without "grant[ing] a prompt hearing" if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"). Rule 4 thus clearly contemplates summary dismissal of a Section 2255 motion by a district court on any fatal ground, even if the ground is one that, in an ordinary civil case, generally must be asserted by the opposing party.

In light of this rule, and the similarly-worded rule that applies to federal collateral challenges of state convictions under 28 U.S.C. 2254, every court of appeals to consider the issue has held that a district court has the authority to raise *sua sponte* AEDPA's statute of limitations, at least before a response to the habeas petition is filed. See, *e.g.*, *Jackson* v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam) (Section 2254 case); *Hill* v. *Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (same); *Herbst* v. *Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001) (same); *Acosta* v. *Artuz*, 221 F.3d 117, 122-124 (2d Cir. 2000) (same); *Kiser* v. *Johnson*, 163 F.3d 326, 328-329 (5th Cir. 1999) (same); see also *United States* v. *Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (applying *Hill* in Section 2255 case). These courts reason that the rule "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser*, 163 F.3d

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[7] Before the amendments that became effective on December 1, 2004, this portion of Rule 4 provided: "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal."

at 328; see, *e.g.*, *Acosta*, 221 F.3d at 123 (*sua sponte* dismissal for failure to comply with the AEDPA limitations period "is consistent with the authority provided to the district courts in 2254 Habeas Rule 4 and 2255 Habeas Rule 4(b)").

As these cases have recognized, the statute of limitations in AEDPA "implicates values beyond the interests of the parties." See, *e.g.*, *Acosta*, 221 F.3d at 121 (citing cases). Collateral review of criminal convictions entails "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998). "Congress enacted AEDPA to advance the finality of criminal convictions. * * * To that end, it adopted a tight time line, a one-year statute of limitation period." *Mayle* v. *Felix*, 125 S. Ct. 2562, 2573 (2005). In adopting that one-year limitation for Section 2255 motions, Congress "clearly intended to limit collateral attacks upon judgments obtained in federal criminal cases." *United States* v. *Thomas*, 221 F.3d 430, 434 (3d Cir. 2000). Indeed, such a limitation is "the very *raison d'etre* of the AEDPA." *Ibid.* As the court of appeals here recognized, that limitation furthers finality, preserves judicial resources, curbs the abuse of the writ of habeas corpus, and promotes the public reputation of judicial proceedings and the public interest generally. Pet. App. 25a; see *id.* 17a-20a, 28a-29a.

As the court below held, these same considerations compel the conclusion that a district court retains the power to raise *sua sponte* AEDPA's statute of limitations, even though the United States files a responsive pleading failing to do so. Pet. App. 28a-31a, 34a-35a. As an initial matter, nothing in the text of Rule 4 limits the district court's power to dismiss motions when "it plainly appears * * * that the moving party is not entitled to

relief" to the time period before the United States files a response. Section 2255 Rules, Rule 4. Indeed, a district court with subject matter jurisdiction always has authority to apply the governing law. Section 2255 expressly empowers district courts to "determine the issues and make findings of fact and conclusions of law." 28 U.S.C. 2255. And the public interests animating AEDPA's statute of limitations are no less important after the court calls for a response than they are before it does so.

As the court below observed, courts have recognized comparable authority in similar circumstances. See, *e.g.*, Pet. App. 21a-22a & n.14. In *Granberry* v. *Greer*, 481 U.S. 129, 134 (1987), this Court held that a court of appeals had the power to dismiss a habeas petition for the failure to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. This Court concluded that "[t]he appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Rather, an appellate court should consider the interests of comity, federalism, and judicial efficiency, *id.* at 135, and decide "whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* at 131. As the Third Circuit observed in *Long*, after *Granberry*, "[i]t is now widely recognized that judges have discretion to raise procedural issues in habeas cases." 393 F.3d at 403. Indeed, at least eleven circuits have extended *Granberry*'s reasoning to procedural default, concluding that habeas courts may raise *sua sponte* that affirmative defense, even if the respondent fails to do so. See, *e.g.*,

Yeatts v. *Angelone*, 166 F.3d 255, 261-262 (4th Cir.) (collecting cases from the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits)), cert. denied, 526 U.S. 1095 (1999); *Lorraine* v. *Coyle*, 291 F.3d 416, 425-426 (6th Cir. 2002); *King* v. *Kemna*, 266 F.3d 816, 822 (8th Cir. 2001) (en banc); see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (reserving the issue).

AEDPA's statute of limitations advances concerns no less important than those advanced by the doctrines of exhaustion and procedural default. Although the interests of comity and federalism do not apply in the context of Section 2255 motions, the public interests in the finality of judgments and in judicial economy plainly do. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982).

ii. Even putting aside the special concerns raised by the fact that this is a collateral challenge to a final judgment, the decision below is consistent with the rules of procedure governing ordinary civil cases. Those rules may be applied in Section 2255 proceedings to the extent that they are not inconsistent with statutory provisions or the Section 2255 rules. See Section 2255 Rules, Rule 12; Fed. R. Civ. P. 81(a)(2); *Mayle*, 125 S. Ct. at 2569. Although, in ordinary civil cases, affirmative defenses generally must be raised in a first responsive pleading, "a defense may be raised in a number of ways even if the defense is not presented in the initial response." 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005).

For example, under Rule 15(a) of the Federal Rules of Civil Procedure, leave of court to amend an answer "should be freely given when justice so requires." See 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 684-685 (3d ed. 2004)

(noting that "Rule 15(b) does give the trial court discretion, which a number have exercised, to permit the amendment of the pleadings over objection when doing so will promote the presentation of the merits of the action, the adverse party will not be prejudiced by the sudden assertion of the defense, and will have ample opportunity to defend against the substance of the issue"). In addition, affirmative defenses may be raised for the first time by a defendant in a post-answer dispositive motion or by the district court *sua sponte* when resolving such a motion. See Moore, *supra*, at 8-36 to 8-40. Accordingly, allowing the United States here to rely post-answer upon the statute of limitations, where petitioner suffered no prejudice as a result, fully accords with the rules of ordinary civil practice. See, *e.g.*, *Long*, 393 F.3d at 399-401.

iii. Petitioner's principal argument on the merits in this Court is that the decision below is unfair, as it places the district court in the role of advocate. Pet. 16-19. That contention is unfounded. The decision below merely recognizes that the district court has the authority to call to the attention of the parties a question as to whether, under the governing law, the statute of limitations has run and to request the parties' views on that issue. Far from being improper, that course represents sound case management on the part of the district court.

b. In any event, this is not a suitable vehicle to review the purported conflict asserted by petitioner for several independent reasons.

i. Because petitioner did not object in the district court to the court's *sua sponte* raising of the statute of limitations issue, nor did he contend that the United States waived the issue by failing to raise it in its

answer, see C.A. App. 95a-99a; C.A. Supp. App. SA3-SA7, a threshold issue exists as to the standard of review that should be applied to the first question presented in his certiorari petition. Furthermore, if the appropriate standard is plain-error review, a definitive interpretation of the power of district courts, post-answer, to raise *sua sponte* a potential issue about Section 2255's statute of limitations would not be necessary to resolve this case.

The United States argued in the court of appeals that, as a result of petitioner's failure to object in the district court, he was entitled only to plain-error review. See Gov't C.A. Br. 5-6; Gov't Supp. Br. 4. Although the court of appeals stated that its review was "plenary," Pet. App. 11a, it provided no rationale for its failure to apply the plain-error standard. Cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (noting that courts have no authority to create exceptions to plain-error standard of Fed. R. Crim. P. 52(b)).

Although this Court has not squarely decided the issue, it has suggested that an unpreserved claim of error in a Section 2255 proceeding is subject, at most, to plain-error review. See *Frady*, 456 U.S. at 167 n.15 ("A court of appeals * * * could invoke the 'plain error' standard on direct review of a district court's conduct of a § 2255 hearing, if the court of appeals found a sufficiently egregious error in the § 2255 proceeding itself that had not been brought to the attention of the district court."); see also Section 2255 Rules, Rule 12 (providing that either the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure may be applied to Section 2255 proceedings, when not inconsistent with

any statutory provision or the Section 2255 rules).[8] To prevail in this Court under a plain-error standard of review, petitioner would have to establish that any error by the district court was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Given the authority discussed above, see pp. 8-15, *supra*, petitioner cannot (and does not attempt to) make that showing.

ii. The conflict alleged by petitioner is not directly implicated by this case. Petitioner points to only two published court of appeals decisions that it claims are in conflict with the decision below. See Pet. 10-13 (citing *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004)). As an initial matter, both of those decisions interpret a district court's *sua sponte* powers in the context of Section 2254 petitions challenging state court convictions. Indeed, with the sole exception of this case, the published court of appeals decisions squarely addressing the question presented have arisen in the context of Section 2254 proceedings, rather than in Section 2255 proceedings.[9] Although the issues are related, and the proper conclusion in each context may well be the same (as the court below concluded, Pet.

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[8] Cf. Fed. R. Civ. P. 46 (requiring party to "make[] known to the court * * * the party's objection to the action of the court and the grounds therefor" at the time the ruling or order of the court); Fed. R. Civ. P. 51(d)(2) (allowing consideration for "plain error" of unpreserved objections to jury instructions if error "affect[s] substantial rights").

[9] Petitioner also points (Pet. 10 n.28, 13 n.36) to two unpublished decisions addressing the issue in the Section 2255 context, but those decisions have limited or no precedential value in their own circuits. See *Armstrong* v. *United States*, 107 Fed. Appx. 522 (6th Cir. 2004); *Celikoski* v. *United States*, 21 Fed. Appx. 19 (1st Cir. 2001).

App. 16a-21a), the fact remains that the decision below is the only published court of appeals decision resolving the issue in the Section 2255 context.[10]

Moreover, this case is not squarely in conflict with either *Scott* or *Nardi*. Neither of the respondents in those cases appears to have affirmatively advanced a statute of limitations defense in the district court, even after the court raised the issue. See *Scott*, 286 F.3d at 925, 928 (noting that "[a]lthough Rule 15(a) allows for the possibility of amending a pleading to include a previously omitted affirmative defense, the mere possibility of amendment through Rule 15(a) does not cure respondent's actual failure to raise the defense"); *Nardi*, 354 F.3d at 1142 n.5 ("[E]ven after the court raised the timeliness issue, Respondent never asserted or otherwise adopted the defense as its own."). In contrast here, once the district court raised the potential statute of limitations issue, the United States affirmatively advocated dismissal on untimeliness grounds, thereby effectively moving to amend its answer.

iii. Review of the question presented at this point would be premature. Even considering the Section 2254 cases, only three circuits besides the Third Circuit have published decisions squarely addressing whether a district court has the authority, post-answer, to *sua sponte* raise a potential statute of limitations problem, and the Eleventh Circuit has done so only in short per curiam opinions. See *Day* v. *Crosby*, 391 F.3d 1192,

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[10] Petitioner asserts (Pet. 19) that this case presents the issue in the contexts of both Section 2254 and Section 2255, but the basis for that assertion is not clear. While it is true that the court of appeals reasoned the result should be the same in both contexts, petitioner sought relief solely under Section 2255, as did Mr. Otero, the movant whose case was consolidated with petitioner's in the court of appeals. See Pet. App. 4a.

1194-1195 (11th Cir. 2004) (per curiam), petition for cert. pending, No. 04-1324 (filed Mar. 30, 2005) (holding that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA"); *Jackson*, 292 F.3d at 1349. In addition, the courts in *Scott* and *Nardi* did not have the benefit of the Third Circuit's thoughtful discussion of the liberal right to amend answers under the Federal Rules of Civil Procedure. See *Long*, 393 F.3d at 399-401.

As such, the issue would benefit from further ventilation in the circuits. That process might result in the elimination of the tension in the circuits that currently exists. But even if it did not, future opinions are likely to take into account the careful analysis of the court below in a way that helps to promote a fuller understanding of the issue.

2. Petitioner also claims (Pet. 20-22) that the court of appeals erred when it did not remand his case to the district court for an evidentiary hearing on the issue of equitable tolling. That claim does not warrant review. In the first place, petitioner alleges no conflict on this fact-bound issue. Second, the majority opinion in the court of appeals did not address this claim,[11]

[11] The en banc majority did not directly address petitioner's request, see Pet'r C.A. Reply Br. 10, that the court of appeals remand the case to the district court for fact-finding to determine whether equitable tolling was appropriate. The majority did, however, make it clear that a court has the inherent power *sua sponte* to address an intentional alteration of a court document that conceals the untimeliness of a Supreme Court filing, and that its inherent power "does not depend on the responding party's position." Pet. App. 31a. Given that the dissenting judges advocated remand for an evidentiary hearing on the equitable tolling issue, *id.* at 36a-39a, the fact that the majority did not order a remand suggests that it either endorsed *sub silentio* the district

and this Court does not normally grant review on issues not passed on by the court below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). And in any event, the district court correctly declined to equitably toll the statute of limitations. Even if it is assumed that the statute may be equitably tolled, see *Pace* v. *DiGuglielmo*, 125 S. Ct. 1807, 1814 n.8 (2005) (noting that the Court has "never squarely addressed the question"), and it further is assumed that the apparent alteration of the court of appeals' judgment entry was an error made in good faith, rather than a deliberate attempt to conceal the untimeliness of petitioner's previous petition for a writ of certiorari, it is well-settled that mistakes or miscalculations by a petitioner's counsel of applicable filing deadlines do not warrant equitable tolling. See, *e.g.*, *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (attorney's miscalculation based on "interpretation of a novel legal issue" of habeas limitations period is not basis for equitable tolling); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (counsel's confusion about applicable statute of limitations does not warrant equitable tolling for filing of habeas petition), cert. denied, 534 U.S. 863 (2001); *Harris* v. *Hutchinson*, 209 F.3d 325, 330-331 (4th Cir. 2000) (same); *Taliani* v. *Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (same).

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court's disposition of the equitable tolling issue, see *id.* at 59a-60a, or agreed with the government that the proffers on appeal relating to the equitable tolling claim were not properly in the record, see note 3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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SEPTEMBER 2005

Supreme Court, U.S.
FILED
SEP - 6 2005
OFFICE OF THE CLERK

No. 05-3

IN THE

Supreme Court of the United States

HERBERT L. BENDOLPH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In this case, the *en banc* Third Circuit thoroughly addressed on the merits the first issue presented in Mr. Bendolph's petition, and it expressly noted that it was siding against the Sixth and Ninth Circuits in a split among the courts of appeals.[1] The judgment over which Mr. Bendolph seeks review is that of an almost evenly divided *en banc* court of appeals and, so, this Court would have the benefit of thorough majority and dissenting opinions. The courts of appeals are split, and this case is the proper vehicle for resolving this important *habeas* issue.

A. Mr. Bendolph did not waive the first issue presented in his petition and, in any event, there is no impediment to this Court's review because the en banc *Third Circuit thoroughly considered the issue.*

The Government is mistaken in its assumption that Mr. Bendolph had an obligation to object to the

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[1] The Government devotes a significant portion of its opposition to an argument that the majority of the Third Circuit was correct. Mr. Bendolph's petition and the dissenting judges of the Third Circuit explained thoroughly why the majority was mistaken and, so, this reply will not repeat those points.

One point in the Government's argument warrants comment, however. The Government expounds at length on the text and potential effect of Rule 4 of the Rules Governing Section 2255 Proceedings, but the Government leaves out any mention of Rule 4(b)'s express language indicating that it applies only to "preliminary review" *before* the respondent files an answer – a situation in no way implicated in Mr. Bendolph's case or in those that form the circuit split. Even the Third Circuit's majority recognized that important distinction and did not rely on Rule 4 to decide Mr. Bendolph's case. *See* App. A at 24a n.15.

district court's *sua-sponte* invocation of the statute of limitations.[2] It is well-established that waiver principles should be applied flexibly. *See Singleton* v. *Wulff*.[3] This Court has made clear that issues unaddressed in the district courts may properly be considered on appeal when the legal landscape has changed between the time of the proceedings in the trial court and those on appeal. *See, e.g., Newport* v. *Fact Concerts, Inc.*[4]

In this case, at the time the district court *sua sponte* injected the limitations issue into Mr. Bendolph's case, the Third Circuit had not yet decided *Robinson* v. *Johnson*,[5] and, so, there was no authority in the Third Circuit for the proposition that the Government *could* waive the affirmative defense of the statute of limitations in the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). The state of the law changed *after* the district court denied

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2 There is some irony in the Government's arguing that Mr. Bendolph, a *pro se* litigant at the relevant time, waived his right to object to the district court's stepping in to cure the Government's (counseled) waiver of the statute of limitations. As this Court has held, *pro se* filings are to be liberally construed. *See Haines* v. *Kerner*, 404 U.S. 519, 520 (1972). The Government's opposition seems to take the view that its own failure to raise an affirmative defense should freely be corrected by the courts but that a *pro-se* litigant's purported failure properly to object to the district court's lending assistance to the Government should be subject to an exacting and technical (and ultimately incorrect) waiver analysis.

3 428 U.S. 106, 120-21 (1976).

4 453 U.S. 247, 256 (1981)

5 313 F.3d 128 (CA3 2002).

Mr. Bendolph's Section-2255 motion. He had no duty to object to the district court's action when the legal predicate to do so did not yet exist.[6]

Even if Mr. Bendolph had such a duty, it would not affect the propriety of this Court's granting review. This Court has found an issue waived and not properly the subject of review when it was *both* not raised below and not passed on by the court below. *See Adickes* v. *S.H. Kress & Co.*[7] More recently, the Court explained that

> [o]ur traditional rule. . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below. That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions.[8]

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[6] Moreover, as the Government candidly concedes, this Court has never held that the waiver/"plain-error" analysis on which the Government relies applies to Section-2255 cases. *See United States* v. *Frady*, 456 U.S. 152 (1982).

[7] 398 U.S. 144, 147, n.2 (1970).

[8] *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (quotation omitted); *see also, Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 376-77 (1995) (quotation omitted, emphasis original) ("In fact, even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice permit[s] review of an issue not pressed so long as it has been passed upon . . . ."); *See also, Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (same).

With respect to the first issue presented in his petition, Mr. Bendolph pressed that issue on appeal, and the Third Circuit granted a certificate of appealability. After extensive briefing and oral argument, a three-judge panel of that court considered the issue. The *en banc* court then took up the issue, accepted additional briefing and oral argument and entered extensive majority and dissenting opinions. The Third Circuit *sub silentio* rejected the Government's waiver contention, and the full court provided what the Government itself refers to as a "thoughtful" discussion. The Government errs in suggesting that there is any impediment to this Court's review.[9]

B. The en banc *Third Circuit expressly made its holding applicable both to Section-2255 cases and Section-2254 cases, and Mr. Bendolph's case directly implicates the undeniable circuit split.*

While Mr. Bendolph presented a Section-2255 motion, the Third Circuit expressly treated the two provisions as interchangeable and made its holding applicable both to Section-2255 cases and Section-2254 cases ("In conclusion, we hold that, upon finding a potential AEDPA statute of limitations problem in a

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[9] *See Newport*, at 453 U.S. at 256 ("Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves.").

habeas case arising under 28 U.S.C. §§ 2254 or 2255, a court may act *sua sponte* at any point in the proceedings . . .").[10]

This Court reviews holdings, and the Third Circuit's holding was that district courts may *sua sponte* raise the statute of limitations *both* in Section-2255 cases *and* in Section-2254 cases. That holding is unquestionably in conflict with holdings of the Sixth and Ninth Circuits.[11] Both the majority and dissenting judges of the Third Circuit understood the *en banc* determination to be at odds with the decisions of those two other circuits.[12] There is, then, an existing circuit split that review of this case would resolve.

Moreover, there is every reason to believe that the Sixth and Ninth Circuits would apply their Section-2254 decisions to Section-2255 cases as the Third Circuit did here. In fact, the Sixth Circuit has

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[10] App. A at 34a-35a. Moreover, district courts in the Third Circuit have begun to rely on the holding in *Bendolph* to raise *sua sponte* the statute of limitations in Section-2254 cases. *See, e.g., Fogg* v. *Carroll*, No. 03-558-KAJ, 2005 U.S. Dist. LEXIS 18157 at *7 n.2 (D. Del. Aug. 26, 2005).

[11] *See, e.g., Scott* v. *Collins*, 286 F.3d 923 (CA6 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134 (CA9 2004).

[12] *See* App. A at 16a and 25a (majority) and 41a (dissent) ("We are on the wrong side of the split between the circuits."). Moreover, the Third Circuit has already begun applying the holding of *Bendolph* to Section-2254 cases. *See, e.g., Knecht* v. *Shannon*, 132 Fed. Appx. 407 (CA3 2005).

already applied *Scott* in the Section-2255 context. *See Armstrong* v. *United States.*[13]

Thus, while the existing circuit conflict relates to Section-2254 cases, there is every reason to extrapolate that division to Section-2255 cases. This case, then, presents the Court with the opportunity to resolve not only the existing and entrenched Section-2254 split but also the inevitable Section-2255 split.

C. With respect to all material facts, this case is indistinguishable from those in which the Sixth and Ninth Circuits reached contrary legal conclusions.

The Government asserts in its opposition that this case is not squarely in conflict with *Scott* and *Nardi* because there is no indication in those cases that the respondents raised the statute of limitations after the district courts prompted them to do so.

The Government's proffered distinction misses the mark. The question presented is whether, when a *habeas* respondent files an answer to the petition (or motion) and fails to raise the AEDPA's statute of limitations, the district court may later cure that waiver. That occurred in this case. That also occurred in *Scott* and in *Nardi.* The fact that, after the district court prompted it to do so in this case, the Government simply signaled its agreement with the district court is immaterial to the propriety of what

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13 107 Fed. Appx. 522 (CA6 2004).

the district court had already done.[14] The waiver had already occurred. The Government's proffered point of distinction, therefore, is not material, meaningful or even valid.

D. The Sixth and Ninth Circuits have shown no inclination to retreat from their holdings, and there is no reason for the Court to speculate that they might.

The Government speculates that something about the Third Circuit's opinion in this case might convince the Sixth or the Ninth Circuits to retreat from their holdings in *Scott* and *Nardi*. The Government does not support its argument with anything more than conjecture. The Sixth Circuit decided *Scott* more than three years ago, and it has given no indication that it will modify that precedent. Just last month, the Sixth Circuit cited *Scott* with approval in *Banks* v. *Jackson*.[15] The Ninth Circuit decided *Nardi* nearly two years ago and, again, there is no suggestion in that court's opinions that it is likely to overrule *Nardi*.

Four courts of appeals have offered precedential decisions on the first issue Mr. Bendolph presents in his petition, and those courts of appeals are evenly divided on the proper legal conclusion.

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[14] Notably, the Government never sought leave to amend its answer.

[15] No. 03-1364, 2005 U.S. App. LEXIS 19077 at *4 (CA6 Aug. 31, 2005).

There is a well-entrenched division that this Court should resolve.

E. The second issue presented in Mr. Bendolph's petition poses a legal rather than a factual question.

The Government mistakenly casts the second issue in Mr. Bendolph's petition as "fact-bound." It is not.

Mr. Bendolph does not ask this Court to resolve any disputed facts (nor did he ask the Third Circuit to do so). He noted the undisputed fact that *someone* other than Mr. Bendolph altered a critical court document so that included an incorrect and misleading date that was necessary to Mr. Bendolph's proper calculation of the date by which his Section-2255 motion was due. Both the majority and dissenting judges on the Third Circuit acknowledged that plain fact (and the Government has never denied it).[16] The question, then, is whether that document alteration warrants an evidentiary hearing in the district court to discover how the document came to be "modified," what effect it had on Mr. Bendolph's effort to file timely his Section-2255 motion and whether equitable tolling might be appropriate under the facts as developed. The question of whether the existence of *undisputed* facts calls for a remand to the district court to develop fully the evidentiary record on a critical point is in no sense "fact-bound."

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16 *See* App. A at 6a-7a (majority) and 36a-37a (dissent).

The Government suggests that the Third Circuit did not pass on this issue. The fact that the five dissenting judges so prominently urged a remand demonstrates otherwise. It is not that the majority did not consider the question, it is that the majority did not explain its failure to order a remand in light of what it acknowledged was an impermissible alteration of a date-sensitive court document.

The AEDPA offers Mr. Bendolph one chance at federal *habeas* review. Despite the fact that all of the judges of the *en banc* Third Circuit agreed that something extraordinary happened in this case, something beyond Mr. Bendolph's control, the majority cut off any further examination of the issue even though its own precedent suggests equitable tolling might be appropriate.[17] That result calls for this Court's review.[18]

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[17] *See Seitzinger* v. *Reading Hospital & Medical Center*, 165 F.3d 236, 240-41 (CA3 1999) (equitable tolling appropriate in "extraordinary circumstances"), and *Brown* v. *Shannon*, 322 F.3d 768, 771 (CA3 2003).

[18] Mr. Bendolph has never suggested that this second issue is the subject of a circuit split. It is, instead, an appropriate alternative basis for reversal should the Court accept the first issue for review but for some reason affirm the Third Circuit on that point. *See Pliler* v. *Ford*, 124 S.Ct. 2441, 2448 (2004) (Stevens, J., joined by Souter, J., concurring in the judgment) ("... I am persuaded that the judgment entered by the Court – remanding to the Ninth Circuit to determine the propriety of equitable tolling – is both consistent with those views and correct.").

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

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